(23,977)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 826.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. E. CROCKETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 2, 1914.

1 In the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

L. D. Smith, for plaintiff in error.
A. C. Grimm, for defendant in error.

2 *Document No.* 1.

Transcript of the Record and Proceedings and Pleadings had in the Circuit Court of Knox County, Tennessee, in the Case of D. E. Crockett against Southern Railway Company.

Pauper's Oath.

Filed March 2, 1911. S. J. Herrell, Clerk.

D. E. CROCKETT
vs.
SOUTHERN RAILWAY CO.

I, D. E. Crockett, do solemnly swear that owing to my poverty I am not able to bear the expense of a suit I am about to commence in the Circuit Court of Knox County, Tennessee, against the Southern Railway Company, or to give a prosecution bond, in said case, and that I am justly entitled to the relief and redress sought, by said action, to the best of my knowledge and belief.

D. E. CROCKETT.

Sworn and subscribed to before me this 2nd day of March, 1911.
J. A. WRINKLE,
Deputy Cir. Ct. Cl'k.

Summons.

Issued 2nd day of March, 1911. S. J. Herrell, Clerk.

State of Tennessee to the Sheriff of Knox County, Greeting:

You Are Hereby Commanded to summon Southern Railway Company to appear before the Judge of our Circuit Court, to be held for the County of Knox, at the Court House in Knoxville, on the first Monday of May next, to answer D. E. Crockett of a plea of damages, personal injury, (Ten Thousand Dollars). Herein fail not
3 and have you then and there this summons.

Witness S. J. Herrell, Clerk of our said Court, at office in Knoxville, the first Monday of January 1911.

S. J. HERRELL, *Clerk.*

Officer's Return.

Came to hand same day issued; executed as commanded by reading the within summons to W. D. Post, Agent, he being the highest officer of Defendant Company to be found in my County.
This April 1, 1911.

GEORGE MONDAY, *D. S.*

Declaration.

Filed April 21, 1911. S. J. Herrell, Clerk.

D. E. CROCKETT
vs.
SOUTHERN RAILWAY CO.

First Count.

The plaintiff, D. E. Crockett, sues the defendant, Southern Railway Company, a corporation, duly in Court by summons for $10,000.00 damages, for that, whereas, heretofore, to-wit: On or about the 15th day of October, 1910, the defendant was and still is a railroad corporation, engaged in the operation of various lines of railroad corporation, extending through, from or via Knoxville, Tennessee, and Coster, Tennessee respectively, to or beyond Middlesboro, Kentucky, Bristol, Virginia, Asheville, North Carolina, Atlanta, Georgia and Jellico, on the border between Kentucky and Tennessee, respectively, with the main tracks, switches, yards, turn outs,
4 and side tracks thereto appertaining; having under its control and management divers and many engines, locomotives, trains and cars; and — its employment divers and many servants, agents, operatives and employees:

On or about the day, month, and year aforesaid, while the plaintiff was an employee of the defendant company, engaged in the discharge of his duties, at or near Coster, in Knox County, Tennessee, the defendant carelessly, and negligently permitted or allowed its road bed, tracks, side tracks, yards, switches and turn outs, at said place, so used, to become, be, or remain rough, out of surface, dilapidated, defective and impaired, on a heavy and hazardous grade, at or near the place aforesaid, the draw heads, couplers, draw bars or knuckles upon its said engine, or locomotive, tender, or cars, so used, to become, be, or remain unsafe, defective and insufficient, the cars, so propelled and handled, by the defendant company, to become, be, or remain without safe or sufficient hand brakes, or to have a sufficient number of brakes properly set to keep its said engine, locomotive, train or cars under safe control, during said operation, and employed or retained in its service, in said operation, an incompetent, reckless and careless negro switchman, brakeman, or coupler; all of which the defendant well knew or could have known by the exercise of ordinary diligence; by reason and on account of which the defend-

ant's said engine, train and cars, on being propelled over and across the defendant's said rough, unsurfaced, dilapidated and impaired road bed, track, side track yard, switches, or turn outs, on said heavy and dangerous grade, in the manner aforesaid, became unfastened and uncoupled, and said trains or cars ran, bumped or crashed together, or into other cars or trains, thereby throwing and hurling the plaintiff from or off of one of said trains or cars upon or against other cars, brakes bumpers, draft timbers, cross ties, rocks, rails,
earth, or other hard substance, thereby injuring the plaintiff
5 in, on, or about the head, arms, body, back, legs and feet, causing the plaintiff the loss of much valuable time; to incur great medical expense; to endure much pain and great suffering; and inflicting upon the plaintiff permanent injuries, to his damages in the sum of $10,000.00 for which he sues the defendant and demands a jury to try the issue joined.

At the time the said injuries were inflicted, as aforesaid, the defendant was engaged in the handling of both interstate and intrastate commerce, trains and cars, and the plaintiff, in the discharge of said duties, as an employee of the defendant company, at the time said injuries were inflicted, as aforesaid, was engaged in and in connection with the handling of said interstate and intrastate cars, trains, and shipments.

Second Count.

The plaintiff, D. E. Crockett, also sues the defendant, Southern Railway Company, a corporation, duly in Court by summons for $10,000.00 damages, for that, whereas, heretofore, to-wit: On or about the 15th day of October, 1910, the defendant was and still is a railroad corporation, engaged in the operation of various lines of railroad extending through, from or via Knoxville, Tennessee, and Coster, Tennessee, respectively, to or beyond Middlesboro, Kentucky, Bristol, Virginia, Asheville, North Carolina, Atlanta, Georgia, and Jellico, on the border between Kentucky and Tennessee, respectively, with the main tracks, switches, yards, turn outs, and side tracks thereto appertaining; having under its control and management divers and many engines, locomotives, trains and cars, and in its employment divers and many servants, agents, operatives and employees:

And on or about the day, month and year aforesaid, while the plaintiff was an employee of the defendant company, engaged in the
discharge of his duties, at or near Coster, in Knox County,
6 Tennessee, the defendant wrongfully, carelessly and negligently permitted or allowed its road bed, tracks, side tracks, yards, switches and turn outs, at said place so used, to become, be, or remain rough, out of surface, dilapidated, defective and impaired, on a heavy and hazardous grade, at or near the place aforesaid, and wrongfully, negligently and carelessly permitted or allowed the draw heads, couplers, draw bars or knuckles upon its said engine or locomotive, tender or cars, so used, to become, be or remain out of repair, defective or insufficient, by reason and on account of which the de-

fendant's said engine, train and cars, on being propelled over and across the defendant's rough, unsurfaced, dilapidated and impaired road bed, track, side tracks, yards, switches and turn outs, on said heavy and dangerous grade, in the manner aforesaid, became unfastened and uncoupled, and said train or cars ran bumped or crashed together, or into other cars or trains, thereby throwing and hurling the plaintiff from or off of one of said trains or cars upon or against other cars, brakes, bumpers, draft timbers, cross ties, rocks, rails, earth, or other hard substance, thereby injuring the plaintiff in, on, about the head, arms, body, back, legs and feet, causing the plaintiff the loss of much valuable time; to incur great medical expense; to endure much pain and great suffering; and inflicting upon the plaintiff permanent injuries, to his damages in the sum of $10,000.00, for which he sues the defendant demands a jury to try the issues joined.

At the time the said injuries were inflicted, as aforesaid, the defendant was engaged in the handling of both interstate and intrastate commerce, trains and cars, and the plaintiff, in the discharge of said duties, as an employee of the defendant company, at the time said injuries were inflicted, as aforesaid, was engaged in and in connection with the handling of said interstate and intrastate cars, trains and shipments.

7 Third Count.

The plaintiff, D. E. Crockett, also sues the defendant Southern Railway Company, a corporation, duly in Court by summons, for $10,000.00 damages, for that, whereas, heretofore, to-wit: On or about the 15th day of October, 1910, the defendant was and still is a railroad corporation, engaged in the operation of various lines of railroad extending through from or via Knoxville, Tennessee, and Coster, Tennessee, respectively to or beyond Middlesboro, Kentucky, Bristol, Virginia, Asheville, North Carolina, Atlanta, Georgia, and Jellico, on the border between Kentucky and Tennessee, respectively, with the main tracks, switches, yards and side tracks thereto appertaining; having under its control and management divers and many engines, locomotives, trains and cars; and in its employment divers and many officers, agents and employees:

And on or about the day, month and year aforesaid, while the plaintiff was an employee of the defendant company engaged in the discharge of his duties, at or near Coster, in Knox County, Tennessee, the defendant wrongfully, carelessly and negligently permitted or allowed its road bed, track, side tracks, yards, switches and turn outs, at said place so used, to become, be or remain rough, out of surface, dilapidated and impaired, on a heavy and hazardous grade, at or near the place aforesaid, and unlawfully, negligently and carelessly permitted or allowed some of the draw bars upon its said engine, locomotive, tender or cars, so used to become, be, or remain otherwise than of standard height, by reason and on account of which the defendant's said engine, train or cars, on being propelled over and across the defendant's said rough, unsurfaced dilapidated and impaired road bed, tracks, side tracks, yards, switches, or turn outs, on

said heavy and dangerous grade, in the manner aforesaid, become unfastened and uncoupled and said train or cars run, bumped
8 or crashed together or into other cars or trains, thereby throwing and hurling the plaintiff from or off of one of said cars upon or against other cars, brakes, bumpers, draft timbers, cross ties, rocks, rails, earth or other hard substance, thereby injuring the plaintiff on or about the head, arms, body, back, legs, and feet, causing the plaintiff the loss of much valuable time; to incur great medical expense; to endure much pain and great suffering; and inflicting upon the plaintiff permanent injuries, to his damages in the sum of $10,000.00, for which he sues the defendant and demands a jury to try the issues joined.

At the time said injuries were inflicted, as aforesaid the defendant was engaged in the handling of both interstate and intrastate commerce, trains or cars, and the plaintiff in the discharge of said duties, as an employee of the defendand company at the time *of* said injuries were inflicted, as aforesaid, was engaged in and in connection with the handling of said interstate and intrastate cars, trains and shipments.

A. C. GRIMM,
Att'y for Plaintiff.

Plea.

Filed May 2, 1911. S. J. Herrell, Clerk.

D. E. CROCKETT
vs.
SOUTHERN RAILWAY CO.

Comes the defendant, Southern Railway Company, and pleads to the plaintiff's declaration filed herein, and for plea thereto say- that it is not guilt- of the wrongs and injuries complained of, and set forth by the plaintiff in his said declaration, and of this its
9 said plea the said defendant puts itself upon the country.

JOUROLMON, WELCKER & SMITH,
Att'ys for Defendant.

Record.

Be it remembered, that at a Circuit Court began and held for the County of Knox, at the Court House in Knoxville, on this the first Monday in September 1912, it being the second day of said month, present and presiding the Honorable Von A. Huffaker, Special Judge, *when* the following proceedings were had and ordered to be entered of record, to-wit:

TUESDAY, *October* 15, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Special Judge, when the following proceedings were had and ordered to be entered of record, to-wit:

2535.

D. E. CROCKETT
vs.
SOUTHERN RAILWAY CO.

Jury Respited Until Tomorrow.

In this cause comes Parties by their Attorneys and came also a Jury to-wit: C. E. Doane, L. S. Williams, J. R. Ward, C. A. Hensley, N. F. Daniel, R. H. Owens, W. R. Lones, H. C. Holbert, J. J. Buffalo, W. T. Sims, John Andes, J. L. Henderson, all good and lawful men, citizens of Knox County, having been summoned, tried, elected and sworn to well and truly try the issues joined and a true verdict render according to law and evidence and having heard certain of the evidence from rendering a verdict are respited until tomorrow monring at 9 o'clock.

WEDNESDAY, *October* 16, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Special Judge, when the following proceedings were had and ordered to be entered of record to-wit:

2535.

D. E. CROCKETT
vs.
SOUTHERN RAILWAY CO.

Judgment against Defendant, $1,000.00, *Lien.*

In this cause came parties by their attorneys and came also a jury heretofore sworn and respited herein, who return into open court to resume the further hearing of this cause. At the conclusion of all the testimony Defendant through its Attorney, moved the court to peremptorily instruct the jury to return a verdict in favor of the Defendant and against the Plaintiff, which motion being well understood and considered by the court is be the Court overruled and disallowed, to which action of the Court Defendants excepts.

The Jury having heard all the evidence and argument of Counsel and having received the Charge of the Court, upon their oaths do say that they find the issues joined in favor of the Plaintiff and against the Defendant and assess the damage at the sume of One Thousand Dollars.

It is therefore, considered by the Court that Plaintiff have and recover of the Defendant the sum of $1,000.00, and all the costs of the cause, for which execution may issue.

Upon motion of A. C. Grimm, Attorney for the Plaintiff a lien is declared on the above recovery for his reasonable or contract Attorney's fees for services rendered the Plaintiff herein.

SATURDAY, *October* 26, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Special Judge, when the following proceedings were had and ordered to be entereed of record, to-wit:

11 D. E. CROCKETT
VS.
SOUTHERN RAILWAY CO.

Comes the Defendant, Southern Railway Company, and moves the court for a new trial of the issues in this case, and to that end that the verdict of the Jury and the Judgment thereon be seat aside.

The foregoing motion *if* continued for further hearing until next Saturday, November 2, 1912.

In re. Special Term.

A special term of this Court being necessary for the dispatch of business is hereby appointed and ordered to begin on the second Monday of November next at 9 o'clock a. m.

SATURDAY, *November* 9, 1912.

Court having been previously adjourned to this date and there being no presiding Judge present, the Clerk opened the Court and continued all pending motions to the ensuing Special Term and thereupon adjourned until Monday morning, November 11, 1912, at 9 o'clock a. m.

J. A. WRINKLE, *Clerk.*

MONDAY, *November* 11, 1912.

Be it remembered that at a Special Term of the Circuit Court of the County of Knox, at the Court House in Knoxville, began and held on this date, to-wit, November 11, 1912, present and presiding the Honorable T. A. T. Nelson, Criminal Judge for Knox County, *when* the following proceedings were had and ordered to be entered of record, to-wit:

12 TUESDAY, *November* 12, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Judge, he having been appointed and commissioned as Judge of the Third Judicial Circuit of Tennessee by Governor Ben W. Hooper, his appointment and commission being in the words following, to-wit:

THE STATE OF TENNESSEE,
Executive Chamber:

To All Who Shall See These Presents, Greeting:

Know ye, that whereas, There is a vacancy caused by the death of the Honorable Eugene M. Webb, Judge of the 3rd Judicial Cir-

cuit of the State of Tennessee, and having confidence in the ability and integrity of Honorable Von A. Huffaker

Now, therefore, I, Ben W. Hooper, Governor of the State of Tennessee, by virtue of the power and authority in me vested do Commission Von A. Huffaker to fill said office of Judge of the 3rd Judicial Circuit of Tennessee, agreeably to the Constitution and laws until the next regular election, with all the powers, privileges and emoluments thereunto appertaining by Law.

In testimony whereof, I, Ben W. Hooper, Governor as aforesaid, have hereunto set my hand — caused the Great Seal of the State to be affixed, at the Department in Nashville, on this 9th day of November, A. D., 1912.

[SEAL.] BEN W. HOOPER.

By the Governor:
HALLUM W. GOODLOE.
Secretary of State.

And the said Von A. Huffaker, having subscribed to the following oath was duly inducted into office, and thereupon assumed the duties of Judge of the Third Judicial Circuit of Tennessee, the oath being in the words following, to-wit:

18 STATE OF TENNESSEE,
Knox County:

Personally appeared before me, the undersigned authority Von A. Huffaker duly appointed and commissioned by Ben W. Hooper, Governor of Tennessee, to be Judge of the Third Judicial Circuit of Tennessee, to succeed the late Judge Eugene M. Webb, to hold said office until the next regular election, who makes oath in dur form of law that he will support the constitution of the United States, and the Constitution of Tennessee, and that he will administer justice without respect to persons, and will impartially discharge all the duties incumbent on him as Judge to the best of his skill and ability.

And he further makes oath that he has not directly or indirectly given, accepted or knowingly carried a challenge, in writing or otherwise, to any person being a citizen of this State nor aided or abetted therein, since the adoption of the Constitution in 1835, and that he will not, during his continuance in office, be guilty of either of these acts.

VON A. HUFFAKER.

Subscribed and sworn to before me this 12th day of November, 1912.

T. A. R. NELSON, *Judge.*

SATURDAY, *November* 16, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Judge, when the following proceedings were had and ordered to be entered of record, to-wit:

D. E. CROCKETT
VS.
SOUTHERN RAILWAY CO.

Defendant's Motion for a New Trial Overruled, Appealed.

Came on for hearing Defendant's motion for a new trial
14 which motion being well understood and considered by the Court is by the Court overruled anl disallowed, to which action of the Court, Defendants excepts and prays an appeal to the next term of the Court of Civil Appeals of Tennessee, sitting at Knoxville, which appeal is granted upon Defendant filing proper appeal bond, and on motion of Defendant 30 days' time is allowed within which to prepare and file a bill of exceptions herein, which when signed by the Court and filed by the Clerk is to become a part of the record herein.

MONDAY, *December* 9, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Von A. Huffaker, Judge, when the following proceedings were had and ordered to be entered of record, to-wit:

D. E. CROCKETT
VS.
SOUTHERN RAILWAY CO.

Comes Defendant in the above styled cause, and tenders to the Court its Bill of Exceptions herein, which being signed by the Court and filed by the Clerk is now a part of the record in this cause.

Bill of Exceptions.

On this October 15, 1912, the above styled case came on for trial, before the Honorable Von A. Huffaker, Special Judge, and a jury, when the following were all the proceedings had, and evidence introduced, to-wit:

The jury was empanelled and sworn; the pleadings were read; the witnesses were called, sworn and excused under the rule.

D. E. CROCKETT, called on his behalf, having been duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?
A. D. E. Crockett.
Q. D. E. Crockett?
15 A. Yes sir.
Q. How old are you?
A. I am thirty-six years old the eighth day of May.
Q. Speak louder?
A. I was thirty-six years old the eighth of May, past.

Q. State whether or not you were working for the Southern Railway Company on or about October 15th, 1910?

A. Yes sir; I was employed by the Southern Railway in the Coster yard.

The COURT: Talk out a little louder, Mr. Crockett so everybody can hear you.

A. (cont'd). I was employed by the Southern Railway Company in the Coster yards, as switchman.

Q. As a switchman?

A. Yes sir.

Q. State whether or not you were hurt on that day?

A. Yes sir, I was hurt on the morning of October 15, 1910.

Q. How were you hurt?

A. I was hurt when an accident occurred; we were switching a west end train—we were getting our Bristol stuff and taking it on the leads—number 9 and number 10 was full and was hanging out upon the lead some distance, about the scale house, and the engine came down the lead and coupled to those cars that were hanging out, and the conductor gave me a signal to cut off clear of number 9, and couple up and shove them up, and before I got around there a negro switchman cut the cars off in the clear and he backed up and
16 threw the switch for number 9, and the conductor called me to him, and he says: "Do you know what ought to be done in shoving cars that way"——

Mr. SMITH: You need not tell what the conductor said.

Mr. GRIMM: Speak a little louder so we can all hear and take your time.

A. (cont'd). I says: "Certainly; there ought to be three or four good brakes set on the head of those cars." And he said "Yes"——

Mr. SMITH: I object to the conversation.

The COURT: Don't tell the conversation.

A. (cont'd). So they shoved on down by and I got on the head end of the car next to the engine, a big Pennsylvania box car and had one foot up on the end sill of the box car and one down in the stirrup and held to the grab-iron, and was looking ahead for the signal, and he shoved on into number 9, and the cars came loose from the engine, and I looked ahead, and I thought I had time to get on top and set the brakes to steady the cars up, to keep from tearing them up, and I started around the corner and was going up the end ladder of the box car, and they stopped and threw me loose from the car and swung me against the tunnel brake of the end car, and I stepped on the end of the end sill and gathered ahold and came back on the top, and there were four or five cars setting down there, and there was quite a space between this cut and what cars were on the lower end of number 9, so when they struck, they sorter stopped for a minute and jerked and started on, and I climbed back on
17 the top, and just as I got up there and went to turn around it hit the other bunch of cars down below and threw me forward and I struck the corner of the car or the running board, I do

not know which, struck something right across the bowels here, and after the thing got still I raised up, got up and sat down on the running board and got sick. I stayed there a little bit, and went back up to the scale house and told the yardmaster, Mr. Hurd or the assistant yardmaster, that I did not believe I was able to make it the rest of the day, because I got hurt down there, and he says, well, you go down in the shanty—that was the place where they kept the lanterns and oil and stuff like that—and rest a while and lay down, and maybe you will feel better and maybe you will be all right and can work the balance of the day. I went down there and laid down or tried to lay down, I could not, and I told him I would have to go in. He asked me if I wanted him to take me in on an engine, and I told him no, I would go over and catch a car, it was a short distance to the Oakwood car line, and he says, you go to Dr. Newman's office, and I told him I would.

Mr. SMITH: Wait a minute; I object to that.

The COURT: What somebody else said to you is not competent.

Q. Before you go any further, where were you struck?

A. Right in the small of the back; right through there; right through there (witness indicates).

Q. That was when they first broke loose and struck?

A. That was when they first broke loose and struck, yes sir, it threw me against the tunnel brake.

Q. What is that?

18 A. It is a brake you use when they are going through tunnels, when a man cannot stand on top.

Q. What is it made out of, wood or iron?

A. Iron.

Q. You were thrown from one car back against another car and hit on your back?

A. Yes sir, it struck me in the small of the back.

Q. Then they struck again and knocked you against the other one?

A. Yes sir; I got up on top of the car, and went to turn around and looked the way the cars were running, and they struck the cars and it threw me right face forward.

Q. I believe you say you could not work that day?

A. No sir, I could not work.

Q. Tell the court and jury whether or not you started to town?

A. Yes sir; I started to town and got on the Oakwood car and the jar of the car got to hurting me so bad through my bowels it seemed like my bowels were all falling out, that I had to sit with my feet against the seat in front of me and steady myself against the car that way—it seemed my bowels were like rock and were falling out—and so I got out here near Pearl Place.

Q. What did you get off for?

A. Because I could not stand the jar of the car riding.

Q. You could not stand the jar of the car riding?

A. No sir.

Q. Did you walk to town?

A. I walked from there on to Dr. Newman's office.

19 Q. State whether or not you were sent to the hospital the next day?

A. Yes sir; I went to the office and Dr. Newman says to me he could not tell exactly——

Mr. SMITH: You need not tell what Dr. Newman said.

Q. Well, did you go or were you sent to the hospital the next day?

A. Yes sir.

Q. How long were you in the hospital?

A. I forget the number of days; sixteen or seventeen days I think; something like that; fifteen or sixteen or eighteen.

Q. When you first went to the hospital what did he do to you?

A. Oh, I cannot tell what all they did not do. The first thing they did, they drawed my water from me—said I was mashed inward.

Q. They had to draw your water from you?

A. Cathe-rized me, I believe, or something like that, is what they called it.

Q. State whether or not they packed you in ice?

A. Yes sir, across here (indicating).

Q. How long did they keep you packed in ice?

A. I think something like from seventy to eighty hours.

Q. From seventy to eighty hours?

A. Yes sir, something like that.

Q. State whether or not you suffered much or little?

20 A. Oh, I suffered terribly.

Q. How long did you suffer so bad?

A. Well, for ten days or longer after I got in the hospital; I began to get better, something like in nine or ten days.

Q. State whether or not your back has ever recovered?

A. No sir, it has not.

Q. State whether or not it still hurts you?

A. It still hurts me all the time it seems like I am in a strain. I would give anything in the world for a little ease. Of course it hurts me worse at times than it does at others; it seems to me like there is a sore place across the back, just about as wide as my hand which is just as tender as your eye.

Q. State whether or not you are able to do any work?

A. No sir, I cannot do any work, to say any work, at all.

Q. How much were you making a day when you were hurt?

A. $3.20.

Q. Have you been able to work since that time?

A. Not but very little. I worked a few days at Bull's Gap.

Q. What kind of work?

A. As yard conductor, and I had charge of the yard at night.

Q. What did they require you to do?

A. I was to see to the movement of the trains in and out of the yard, make up trains and see that they were in proper shape to take out.

21 Q. How long did you work there?

A. I worked a little over a month I think, something like thirty odd days.

Q. Was that hard work?

A. No sir, it was not to say labor about it.

Q. Just sorter overseeing?

A. Yes sir, very light work.

Q. How much have you been able to earn since you were hurt?

A. All put together I have not earned $150.00, I don't suppose in all, the two years, since I was hurt.

Q. And that was October, 1910?

A. Yes sir, this morning two years ago.

Q. What kind of a car was it you were on when this collision occurred?

A. A Pennsylvania box car.

Q. Was it a loaded or an empty car?

A. A loaded car.

Q. Where was it loaded for?

A. It was marked "destination Bristol."

Q. Is the depot in Bristol, Virginia or in Bristol, Tennessee?

A. It is in Virginia.

Q. I mean is it in Virginia or Tennessee?

A. It is in Virginia.

Q. State whether or not trains going from here to Bristol run into Tennessee and stop?

A. No sir, they pull across the state line into the Virginia yards over on the N. & W. yards across the state line.

22 Q. What kind of a car was it that you were thrown against?

A. There were two big Pennsylvania box cars right together, and they always as a general thing have good brakes on them, and I thought I would get those two big Pennsylvania brakes set and steady the cars up and prevent an accident.

Q. State whether or not the other Pennsylvania car, the one you were thrown against, was loaded?

A. Yes sir; they were both loaded for Bristol.

Q. They were both loaded for Bristol. Do you know whether or not the Southern Railway runs into Virginia, North Carolina and Georgia?

A. North Carolina——

Q. Do you know about Virginia?

A. No sir, I could not say about it. North Carolina and Tennessee though——

Q. I hand you a pamphlet; what is that?

A. A Southern Railway time table.

Q. Where did you get that?

A. At the Southern depot.

Q. At the Southern depot. Does that have a map of the Southern Railway system in it?

A. Yes sir, I suppose it does.

Mr. SMITH: I admit that the Southern Railway Company has lines that run out of the state and into Virginia, not lines that run from here to Virginia; it has lines in Virginia.

Q. I hand you another paper. What paper is that?
A. That is a Pennsylvania time table.
23 Q. Where did you get that?
A. At the Atkins Hotel.
Q. Does the Pennsylvania Railroad have any line in Tennessee?
A. Not that I know of, no sir.
Q. State whether or not this Pennsylvania Railroad time table has a map of the Pennsylvania system on it?

Mr. SMITH: I object to that map. The Southern Railway has nothing to do with it.
Mr. GRIMM: I thought he got it from the Southern Railway Company's office. I told him to.
Mr. SMITH: He got it from the Atkins Hotel, he said.
The COURT: He said he did not get it from the Southern Railway Company. I sustain the objection.

Q. Do you know the number of the engine that was pulling the train that broke in two?
A. Yes sir.
Q. What was the number of it?
A. Switch engine 649.
Q. #649.
A. Yes sir.
Q. What was the condition of the draw bar on that engine?
A. Why, it was rather low.
Q. What was the condition of the draw bar on the end of the engine that was attached to the car?
A. I don't understand.
24 Q. I am talking about the end of the draw bar that was attached to the car?
A. Why, it was low; it would not catch more than half of the knuckle on the Pennsylvania car.
Q. About how high was it from the center of the road to the center of the draw bar?
A. Not over two and one-half feet.
Q. How wide are the knuckles on those draw bars?
A. I think they run from eight to ten inches, something like that.
Q. From eight to ten inches?
A. I think the knuckle is about ten inches.
Q. How much do you say would catch when they would hook?
A. If it was a loaded car there would be something like half the knuckle catch that way (indicating); if it was an empty car it would not be quite so much, not be quite half of the knuckle catch.
Q. State whether or not this engine was used in connection with any other engine in drawing out or pushing out the loaded trains?
A. Well yes; a great many times they would get in a hurry and late in the evening, and want to clear some track for some train

that was hanging out in the dip, and they would use 621, that is the load-side engine, they would cross over and put it on the loaded train and hook 49 to 21.

Q. Why did they hook 49 in front of 621?

A. As a general thing the 49 would pull loose in pulling over a rough place and cause some trouble in pulling out; if it
25 pulled loose from 21 they could keep on and pull it over the hill.

Q. As I understand you they hitched 621 next to the cars?

A. Yes sir.

Mr. SMITH: Let him tell it.

Q. Well, go ahead.

A. Whenever they would want to pull a train out of the yard and be in a big hurry, they would cross 21 over and hook it to the train and 49 would couple to the back end of 21 and pull them out on the lead to switch.

Q. Why did they do it that way?

A. The engine had been giving them trouble in pulling loose. 49 would not stay coupled as good, in pulling out on to the lead, as 21 would.

Q. What kind of a grade is there in the yard out there at Coster?

A. It is a pretty steep grade.

Q. State whether or not you keep what is known as carherders out there?

A. Yes sir.

Q. What for?

A. Why, it set sufficient brakes on trains on tracks in the yard to hold them.

Q. On standing cars?

A. On standing cars, yes sir.

Q. To hold them?

A. Yes sir.

Q. Why did they have to hold them?

26 A. They would roll away from there.

Q. On account of the grade?

A. On account of the grade; if there were not sufficient brakes set on them.

Q. What was the condition of the yard?

Mr. SMITH: Wait a minute; I object to that question if your Honor please; this accident did not occur all over the yard.

The COURT: Yes.

Q. What track did this occur on?

A. This occurred on track number 9.

Q. What was the condition of track number 9?

A. It was in bad shape.

Q. Bad shape how?

A. Why, it was rough and there was muddy marshy places in it; there were places where the track would swing; the track would be in a loblolly.

Mr. SMITH: I think this inquiry ought to be confined to the locality of this accident.

The COURT: I have held that it should.

Mr. GRIMM: I have limited my question to track number 9.

The COURT: That is what I understand.

Mr. SMITH: But track number 9 was a mile long.

The COURT: Yes; it should be confined to the place of the accident, or about that place.

Q. About what portion of track number 9 were you hurt on?

A. It was something like one-third of the distance, a little
27 better than a third down into number 9.

Q. What was the condition of track number 9 along at that place?

A. Right where I was hurt, it was right at that marshy place.

Q. What do you mean by marshy place?

A. Why, it seemed to be a seep there, a marshy place so that the track was damp and water was standing between the tracks.

Q. What was the condition of the cross ties at that place?

A. They were rotten, some of them broken in two.

Q. What would be the effect of a car running off of a rail that was lying on a solid cross tie onto a rail that was lying on a rotten cross tie?

Mr. SMITH: I object to that; there was no derailment here.

Mr. GRIMM: I did not say there was.

Mr. SMITH: No car went off the track.

The COURT: I think it is only proper to show the conditions that prevailed there.

Mr. SMITH: I don't object to that; he is asking him what would happen.

The COURT: You are asking for a conclusion. I think that is a matter for the jury to pass upon.

Mr. GRIMM: All right.

Q. How wide do you say those knuckles on the draw bars are?

A. Well, I would think from eight to ten inches apart.
28 Q. From eight to ten inches apart?

A. Yes, sir; the Jenny knuckle is not as wide as the Major and the Hines; I did not measure them.

Q. Was this engine ever used on the Knoxville and Augusta yards that you know of, of your own personal knowledge?

A. I have gone with it to the Knoxville & Augusta yards and switched out cars.

Q. State whether or not it came uncoupled there?

Mr. SMITH: Well now, I object to that, if your Honor please.

The COURT: That would not be competent without some reference to time surely.

Mr. GRIMM: I withdraw the question.

Cross-examination by Mr. SMITH:

Q. Mr. Crockett, what was the date of this injury that you say occurred?

A. On October 15, 1910.
Q. When was it that you went to work after that?
A. It was some time in December.
Q. What time in December?
A. The 23rd. I don't remember exactly the date. The 3rd or 23rd, I am not sure which.
Q. I did not understand you?
A. I say, I am not sure whether it was the 3rd or the 23rd; I could not be positive which. It was sometime in December.
Q. Where did you go to work at then?
A. At Bulls Gap.
Q. At Bulls Gap?
29 A. Yes, sir.
Q. For whom?
A. For the Virginia & Southwestern.
Q. What sort of work were you doing?
A. I was employed as yard conductor.
Q. Yard conductor?
A. Yes, sir, that is the way I filled out the blank.
Q. That is foreman of the operation of trains in the yards at Bulls Gap for the Virginia & Southwestern?
A. Foreman of the yard engines, yes, sir.
Q. Engaged in switching cars?
A. Having it done, yes, sir.
Q. You helped to do that, did you not?
A. I was there and I seen after it.
Q. You were not a looker-on?
A. I was there and I seen that it was done; yes, sir.
Q. Was that all, you just saw it done; is that what a yard conductor does, to see it done?
A. Sure; that is his business.
Q. Don't he do anything else only just to look on?
A. Certainly, he gives orders.
Q. Tell what you did?
A. You tell what you want done; you have it done.
Q. Is that all it is, to tell somebody what you want done?
A. You have got men to do the work.
Q. Don't you do anything?
A. Oh, occasionally, yes, sir.

30 Mr. GRIMM: The question is what he did, not what other yard conductors did.
Mr. SMITH: I am asking him what he did.

Q. Did you just look on and see things done up there at Bulls Gap?
A. No, sir, I gave orders and told what I wanted done.
Q. I say, is that all you did, just look on and give orders?
A. Well, I don't know, I suppose——
Q. Did you stand still and give orders?
A. No, sir, I went wherever duty called me to go.
Q. Wherever did it call you?
A. Anywheres in the yard.

Q. All over the yard?
A. Yes, sir.
Q. You had to follow the engine, follow the cars and get on the cars?
A. Not necessarily.
Q. How?
A. It was not necessary to follow them all the while.
Q. I say, you did do that in the course of your work?
A. Occasionally; yes, sir, occasionally.
Q. You got on top of the cars?
A. It was very seldom that I got on top of a car.
Q. I say you did get on top of them?
A. I suppose I did.
Q. And turned the brakes?
A. No, sir.
Q. You never did touch a brake while you were up there?
A. Oh, I could not say that I did not touch one. I might
31 have climbed up on a car and set one brake, something like that.
Q. Did you never turn one while you were up there?
A. I could not say whether I did or not.
Q. You were able to work weren't you?
A. No, sir, I wasn't able to work really.
Q. How long did you work at it?
A. I think it was thirty some odd days.
Q. You commenced in December?
A. Yes, sir.
Q. Here is a time ticket, what purports to be a time ticket of the trainmen and engineers in the yard at Bulls Gap. It shows conductor D. E. Crockett, date December 2nd, 1910.
A. No, the third.
Q. All right, about December second or third.
A. I thought it was the third or twenty-third. I got the date mixed.
Q. Then you worked up until sometime in January?
A. Yes, sir, until the 23rd day of January.
Q. What made you quit?
A. Well, I was wanting to come to Knoxville after my wife.
Q. I didn't understand you?
A. I wanted to come to Knoxville after my wife to take her back to Midway, and I got off on the 23rd of January.
Q. The 23rd of January?
A. Yes, sir.
Q. Were you discharged?
A. No, sir, I was not discharged.
32 Q. Who did you work for up there?
A. I worked for Mulvaney; he was superintendent; and Trent was——
Q. Didn't you quit up there because you got drunk on a job?
A. No, sir.
Q. You deny that, do you?
A. I deny being drunk; yes, sir.

Q. Do you deny getting discharged for drunken-ess?
A. They never gave me no discharge at all.
Q. When you were discharged, didn't they tell you you were discharged for drunkenness and getting drunk on a job?
A. No, sir. I can explain what you are driving at exactly.
Q. Do you say that is so or not so?
A. No, sir, I was not drunk.

Mr. GRIMM: I ask that the witness be permitted to explain.
The COURT: He may explain.

Q. Well, explain.
A. One night on the 19th, I believe it was on the 19th of January, I got on an engine and went to the coal-tipple with them after coal, and I had been up that day and was sleepy and came back, I had nothing in the yard to switch, and I told the boys that I was going to get off at the office, and they could go on up and they had not had any supper and so I went on over to the office and leaned my head on the table and took a little nap, and during that time the engineer or brakeman or some of them went down and
33 called Mitch. Hurd and told him I was lost, they could not find me, and I was sitting up there at the office after telling them there was nothing to do but to go up to the store; so Mitch. Hurd, that was the day man, sent this fellow John Pitts, I believe it was, up there, and he went on down after awhile and they were delivering a bad-order out of some Asheville stuff, and I seen there was an extra lot of the cut of cars, and I heard them move and go on down there, and Pitts was up there, and I says, what are you doing up here, Pitts——

Mr. SMITH: I do not want the conversation between you and Pitts.

A. (Cont'd) He says——

Mr. SMITH: Wait a minute; that is not competent, if your Honor please.
The COURT: No, it is not competent to tell the conversation between you and somebody else.

Q. Now, you say you were not discharged at all; you quit voluntarily?
A. No, sir; I worked on until the 23rd and told Mr. Hurd I wanted to go after my wife at Knoxville.
Q. Were you discharged or did you quit voluntarily when you did quit?
A. I laid off and when I went back there Hurd told me he had orders not to work me any longer. I asked what for——
Q. What I want to know is when did you quit?
A. On the 23rd of January I laid off.
Q. On the 23rd of January you laid off; you were not discharged at all?
A. No, sir.
34 Q. You then quit voluntarily?
A. No, sir, I just laid off; I was going to come back after I taken my wife and baby off. I laid off like any other man does.

Q. You quit work at that time; that was the last day you drew any pay from them?

A. Yes, sir; yes, sir.

Q. That is what I am trying to get at; and you did that of your own accord?

A. Yes, sir, I asked to get off like a man, on the 23rd.

Q. What were you getting up there?

A. I think they were paying something—to work 12 hours—I think they paid $4.08; I think that is what they were paying then.

Q. And you worked from the second or third of December up to the 23rd of January?

A. Yes, sir, but I lost some time in there.

Q. You made extra time too, did you not?

A. No, sir; occasionally I would work dinner hour, you know; that was an hour overtime.

Q. How is that?

A. When we would work at the noon hour, we would get overtime.

Q. Didn't you work over time nearly every day you worked?

A. Yes, sir.

Q. From one to two hours?

A. Yes, sir; we would get sometimes two hours over-
35 time. We were supposed to be working ten hours—on the ten-hour basis, you know.

Q. How much did you make while you were up there from the second or third of December up to the 23rd of January; you made about four dollars a day?

A. I said the time, if you worked long enough, would pay four dollars and something; I don't remember now exactly what.

Q. You made over $150.00 while you were up there didn't you on that job?

A. I don't suppose I did, no.

Q. How?

A. No, sir, I don't suppose I did; that is all I have ever made——

Q. Look at these tickets and see if they don't show you how much you did work up there. Did they pay you by the hour or by the day?

A. They paid by the day, and for overtime.

Q. Begin there with December third; how much did they pay you an hour?

A. I could not say what it was.

Q. Haven't you got any idea about what you drew?

A. No, sir, I never gave that any thought.

Q. You never gave any thought to about how much pay you were getting?

A. No, sir. $3.60 or $3.80—I believe it was $3.60; I am not sure.

Q. For how many hours?

36 A. Ten hours.

Q. About 36 cents an hour then, or 40?

A. Something in the neighborhood; I never gave it any thought.

Q. Those are the time cards; you recognize them?

A. Yes, sir.
Q. Are these your signatures here?
A. Yes, sir, that is my handwriting.
Q. Look through all of them; they will show the number of hours you worked.
A. Yes, sir, just whatever they show, that is what it is. That is my handwriting. Here is one I did not make out.
Q. What is the date of that one?
A. That is W. E. Miller, December 12.
Q. That is somebody else's?
A. Yes, sir.
Q. Just those that have got your name on?
A. There is one.
Q. The ones that have got your name on represent the time you worked?
A. Yes, sir. R. A. Chestnut; this is his ticket; there is Chestnut, Chestnut, Chestnut, Chestnut again, Chestnut; Chestnut; Chestnut (witness turns over tickets in his hand).
Q. Look through the other way; you will find some of yours, I guess.
A. Here is one of mine, this top one. There is another one.
Q. I wish you would give the stenographer the number of hours that you worked on each one of these tickets; run through
37 them and give the stenographer the number of hours regular time and overtime. Did you get the same pay for overtime that you did for regular time?
A. Yes, sir.
Q. Give him the date and the number of hours you worked?
A. Twelve hours.
Q. What is the time?
A. Twelve hours.
Q. Give him the date?
A. That is the first and first.
Q. What is the overtime; ten hours is the regular time?
A. Yes, sir.
Q. And if it is twelve hours, it is two hours' overtime?
A. Yes, sir.
Q. Twelve hours on what date?
A. On the first and first; second, 12 hours; 12 hours——
Q. Are you giving them to the stenographer?
A. Yes, sir.
Q. I did not hear you?
A. All right. The 11th——
Q. Give him the dates and just the hours?
A. You come back here and help me. You call them off and give them to him yourself.
Q. January 1st, 12 hours; January 2nd, 12 hours; January 3rd, 12 hours?
A. I meant that that was the whole hours. That says overtime. That is the number of hours' work.
Q. This is the time in all, is it?

38 A. Yes, sir.

Q. Then you had better go back and get it right. You said 12 hours and you mean 11 hours?

A. I claim one hour there which made 11 hours in all.

Q. January 1st, 11 hours?

A. Yes, sir, 11 hours.

Q. January 2nd, 11 hours?

A. Yes, sir.

Q. January 3rd, 11 hours?

A. Yes, sir.

Q. January 4th, 12 hours?

A. Yes, sir.

Q. January 5th, 12 hours?

A. You see that would make it 14 hours to count the other two.

Q. January 6th 11 hours; January 7th, 11 hours. You were working pretty regular along then, weren't you?

A. Yes, sir.

Q. January 8th, 11 hours; January 9th, 11 hours; January 10th, 11 hours; January 11th, 11 hours; January 12th, 11 hours; January 13th, 11 hours; January 14th, 11 hours; January 15th, 12 hours; January 16th, 11 hours; January 17th, 11 hours; January 18th, 11 hours; January 20th——

A. You see, that is not my handwriting.

Q. It is not your handwriting, but that is your time ticket, is it not?

A. I see G. M. Hurd up there, yardmaster.

Q. This ticket of January 20th says that you worked as a brakeman on that day 12 hours; is that right?

39 A. He has got down there—I don't know what he has got up there, he says "White"——

Q. I take it that stands for brakeman. It says occupation, y. m. z. for yardmaster. Hurd was yardmaster?

A. Yes sir.

Q. You sometimes acted as brakeman or switchman didn't you, occasionally and as yardmaster once in a while?

A. Yes sir; I had charge of the yard at night, yes sir.

Q. At any rate——

A. That was when he sent Pitts up there, and I went onto the engine in daytime until I got off on the 23rd, when Hurd could get a man to relieve me, and Walter Hill relieved me on the 23rd.

Q. So on the 20th, you worked 12 hours as shown by this ticket?

A. Yes sir.

Q. And on the 21st 12 hours, again?

A. Yes sir.

Q. And then it gets back to December, December 2nd, 11 hours; December 2nd 11 hours, that is right, is it?

A. Yes sir.

Q. Here is December 9, D. E. Crockett, night yardmaster, 12 hours; is that right?

A. Yes sir; but that is not my handwriting.

Q. I know, but that shows that you worked that many hours on that day, does it not?

A. That is what the ticket shows, yes sir.

Q. That is right, isn't it? Night yardmaster December 10, 12 hours. Night yardmaster, December 11, 12 hours. De-
40 cember 3rd, 11 hours; December 4th, 11 hours——

A. I never made out that ticket.

Q. It shows that you worked 11 hours?

A. Yes sir, it shows my name there; yes sir.

Q. December 5th, 11 hours?

A. That is my ticket.

Q. December 6th, 12 hours, December 7th, 12 hours; December 8th, 11 hours; December 12th, 12 hours.

A. I don't know who made that ticket out.

Q. That is one of your time tickets?

A. Yes, but I never made it out; I don't know who made it out.

Q. You drew that much time according to this ticket on December 12th—12 hours?

A. Yes sir.

Q. December 13th, 12 hours; December 14th, 12 hours; December 15th, 12 hours; December 16th, 12 hours; 17th, 12 hours; 18th, 12 hours; 19th, 12 hours; 20th, 12 hours; and December 31, 12 hours. Now, refreshing your recollection from these tickets, you worked nearly every day from the time you went there?

A. No, not necessarily so.

Q. Except the one week from December 23rd up to the 31st, did you not?

A. No sir. I lost some time in there.

Q. How much time?

A. I don't remember; I don't remember the number of days; some three or four days though.

Q. You told us that the yard conductor has got an easy
41 job?

A. Well, he has; he can make it hard on himself or make it easy.

Q. You made it easy on yourself?

A. Yes sir, I took it just as easy as possible.

Q. Ordinarily a yard conductor has to cut loose the cars, don't you?

A. Yes sir, he does that.

Q. Did you do that sort of work?

A. Part of the time I did; I cut a few cars.

Q. Those yards are very crooked, are they not?

A. There is a big long curve in it.

Q. There is a big long curve, and it is necessary for the conductor to get on the cars to help give signals, is it not?

A. No, you don't pull out that many cars; you could not pull a cut of cars out there where the engineer could not see the signal.

Q. There is no such place in the yard?

A. Unless he would be on a flat car or low sided *gon* and have a box car on the inside of the curve.

Q. Now then, Mr. Crockett, as I understand you, the cars that broke loose from the engine out here at the time you were hurt, were

being moved along a lead track, going into side track number 9 or number 10, which was it?

A. We were getting our Bristol stuff on number 10 and it got filled up and was hanging out on the lead up to the scale house.

Q. Were these cars that you were removing off of the lead
42 on number 9 track?

A. Yes sir, they were headed in number 10 and hanging out, and had number nine blocked; we were taking our short loads, such as Johnson City and Bluff City stuff to number 9.

Q. I am talking about these cars that you were on at the time that they became uncoupled from the engine; they were coming off of the lead onto what track?—number 10?

A. We had pulled out the lead, yes, and headed in, pulled them off of number 10 and were heading down in number 9. Number 10 would not hold them.

Q. At the time they cut loose what track were the cars on?

A. The cars were standing on the lead and on number 10.

Q. That is what I thought, on the lead?

A. On the lead, hanging out on the lead up to the scale house.

Q. (Indicating on chalk drawing.) That lead track extends north and south there through the yard don't it, starting up here we will say at Sharp's Gap?

Q. Let us bring this lead down this way. Now, these tracks make off from this main lead track 9 and 10 to the left, going down this way, do they not?

A. Yes sir; to the right, looking yon way.

Q. The jurors are looking at it from the Sharp's Gap end?

A. Yes, that is from the left.

Q. They are looking down the tracks at the upper end?

A. They turn to the left.

43 Q. They turn to the left and run down this way sorter parallel with the lead?

A. Yes sir.

Q. Coming from the upper end down, do you come to number 9 or number 10 first?

A. You come to number 9 first.

Q. Number 9?

A. We first—next to the far side of the yard, the first lead, is the old ma-n track.

Q. We will leave them all out of it and get to the main or principal track; this is the lead, here is number 9 and here is number 10?

A. This one is number 9 and this number 10.

Q. You mean the lead is number 10?

A. Yes sir. From number 9 switch down here is called number 10; this first track is number 9 and the outside is the lead—is number 10.

Q. 10 is the lead itself?

A. It starts over from another lead and comes on down here and runs down by the side of number 2 lead and that is number 11 on the loaded side.

Q. All right; we will change that a little bit. The lead gets to be number 10 down here (indicating)?

A. After it passes number 9 it is called number 10.

Q. And then number 9 and number 8 would be over here and 7 and so on?

A. Yes sir; that is on the loaded side. There is another lead here; this is the empty side lead, and that is the loaded side lead.

44 Q. Now as I understand you this train of cars that you got on, this cut of cars that you got on, was coming down this lead track here?

A. They were headed towards number 10, yes sir.

Q. Was the engine in front or behind?

A. The engine was behind the cars, but it was headed the way the cars were going.

Q. The engine was attached to the rear of the cars, pushing them forward?

A. That was the case later, but you are speaking about the cars being on the lead?

Q. I am talking about the time this accident occurred?

A. Sure, we had a hold of the cars and were shoving down into number 9.

Q. You were shoving how many cars into this lead?

A. There were nine or ten cars, possibly.

Q. At the time you got hurt?

A. Yes sir.

Q. In the cut that you were on?

A. The ones we had hold of with the engine.

Q. The engine was pushing them down the lead?

A. Ahead into number 9.

Q. I don't care what they were ahead of.

A. No; we shoved them down the lead until we picked them up and backed up and pulled up to number 9 switch, and then headed in.

Q. At the time the engine broke loose from the cars, it was pushing them down this lead?

A. No sir, down into the track.

45 Q. You were down on the track?

A. I was down on the track, the engine was away down below the lead.

Q. At the time the cars broke loose?

A. At the time the cars broke loose.

Q. On track number 9?

A. On track number 9.

Q. I understood you to say they were on this lead?

A. They were hanging out onto the lead, but we coupled to all these cars and were headed into number 9 track; number 10 was full and we were hanging out to the scale house; say up here was the scale house, they were hanging out here and cut off in the clear. There was a clearing post right here.

Q. At the time these cars broke loose, the engine was pushing some eight or nine cars down this track over on number 9?

A. We were down in number 9.
Q. You had brought them up from this main lead?
A. Pulled them up from the main lead, the engine had done passed over the lead into the track.
Q. The engine had passed up here when they broke loose?
A. Yes sir, into number 9.
Q. But after you came down this lead, the engine was backing down, pushing the cars down this lead and onto track number 9?
A. Yes sir, it had passed over the lead.
Q. I understand that, but it had come down to this track, had it not?

A. Yes sir, the cars were bound to come down there.

46 Q. In the first place you had pulled them out of number 10, these same cars?
A. We had pulled them from the clear.
Q. The engine had taken hold of these cars that were standing on number ten track and pulled them up the track?
A. The end of the cars was up near the scale house. You see he came down the lead and coupled them onto the lead and a fellow cut off on the clear and backed up and passed number 9 switch and then shoved them all in the lead.
Q. Let me go back a litttle; there were a number of cars standing on number ten lead?
A. Yes sir, on the lead.
Q. They were extended on down here below the switch at number 9 and on up above here?
A. Yes sir.
Q. The engine, as I understand you, pulled these cars up?
A. Yes sir.
Q. These cars that afterwards went down from number 9 were pulled up this way?
A. Yes sir.
Q. And some of the cars were cut loose, were they?
A. They were cut loose, yes sir, this track was loose.
Q. And pulled up above this switch to number 9?
A. Yes sir.
Q. Then the engine pushed them down this way?
A. Shoved them down into number 9.
Q. Shoved them down into number 9, and as they were passing the engine cut loose from the cars?

47 A. The engine became detached.

Q. The engine became detached, that is all you know about it; the engine became detached. Now, where were you when you got on that car?
A. I was talking to the conductor.
Q. I know you were talking to him; but I said where were you?
A. Right in the clear of number 9, between 9 and 10.
Q. Down this way (indicating)?
A. Right in here. He was along in here between the two leads; you see here is the load side lead over here, and he was here and

called me to him, and we sat there and talked and he shoved into number 9 and I caught the head end of the first box car.

Q. After it passed the clear of this number 9 lead?

A. Yes sir. I got on here and was coming on down in there.

Q. You were talking to the conductor over here on the right hand side of that lead as these cars were coming down number 9 over on this side; you were over here talking to the conductor?

A. Yes sir.

Q. Walking along by the side of the cars, were you not?

A. No sir.

Q. Or were you standing still?

A. I was standing there, talking.

Q. You were standing there talking when these cars came along?

48 A. No, sir; they backed up and we stood there while they were backing.

Q. While they backed up you were standing over there?

A. Yes sir.

Q. You came up here, down on number 9, and then you came over here and got on the car?

A. Yes sir.

Q. And was in the act of going up on the car?

A. Yes sir.

Q. When they struck the other cars below there or when they cut loose?

A. No, when they pulled loose I felt them pull loose.

Q. Where were you when they pulled loose?

A. I was hanging on the corner of the box car.

Q. You were hanging on the corner of the box car right here about the time you got on?

A. No sir, it was shoved in there four or five car lengths.

Q. How far?

A. Four or five car lengths.

Q. Did it take you all that time to get up on the car?

A. No sir, I was not aiming to go up there.

Q. You caught the car up here in the clear, you told us.

A. Yes sir.

Q. And had got on the corner when they broke loose?

A. No sir; it was shoved down in there four or five or maybe five car lengths, and when they broke loose I was on the corner of the car.

49 Q. Where had you been in the meantime?

A. I was hanging on the corner of the car and was going to cut the engine loose when we got down there and bring the engine back to the top of the hill.

Q. So you got there and was hanging there when they broke loose?

A. Yes sir.

Q. What was your position on that car at the time they broke loose?

A. You mean in the way I was standing?

Q. Uh-huh?
A. I had one foot on the stirrup.
Q. And that is the stirrup on the side of the car?
A. Yes sir.
Q. Taking this for the side of the car, there was a stirrup on its side?
A. On the corner.
Q. Well, right at the corner, that you put your foot in and up here was a grab-hold?
A. Yes sir, a grab-iron.
Q. And you had your hands on that grab-iron and your foot in the stirrup?
A. And one in the corner of the end sill.
Q. How far was that corner from the ground?
A. About two feet, I guess.
Q. About two feet; well, when you felt them break loose, when you felt them break loose you started to get up on the car?
A. I came around between the cars and started up the
50 end of this car.
Q. But at the time they broke loose you had your foot down here in the stirrup, and your hand ahold of this handhold?
A. Yes sir.
Q. You heard the engine pull in two?
A. Yes sir.
Q. You were on the car that the engine was coupled to?
A. Yes sir, the head end of the car was the one that the engine was coupled to.
Q. The engine was at one end of that car and you were at the other?
A. Yes sir.
Q. When they broke loose you started up on the car?
A. Yes sir.
Q. And how far up did you get before they struck the car?
A. I got up something near the top of the car.
Q. You did not get up to that tunnel brake, did you?
A. No sir, my head was above the tunnel brake.
Q. So you were climbing up the ladder at the time you struck these cars?
A. Yes sir.
Q. Did you go up hurriedly or did you poak along?
A. I was in a hurry.
Q. Just as quick as you could; when it did break loose you started up the ladder to get to the brakes; is that it?
A. I was going, making for the brakes; yes sir.
Q. You say you were going up the ladder as rapidly as
51 you could go?
A. Yes sir.
Q. How far below were the cars that you struck?
A. They were not very far.
Q. About how far were they?
A. I cannot tell; I was looking at the second bunch of cars.

Q. You could give a better idea than the jury; you were there and they were not?

A. It must have been in three or four car lengths of the other cars.

Q. In three or four car lengths of the other cars when the engine broke loose?

A. Yes sir, maybe six car lengths from the engine.

Q. Maybe six?

A. Yes sir.

Q. How fast were they moving?

A. They were moving at a very common gait.

Q. Three or four miles an hour?

A. Oh, it would beat four miles an hour right sharply.

Q. At any rate, before you could get to the top of the car they ran into the other cars?

A. Yes sir.

Q. How long had you been at work out there?

A. In the yards?

Q. Out there in those yards; yes sir, on that job?

A. I went to work the third day of May 1906, I believe was the date.

Q. And had been working regularly on?

52 A. Yes sir.

Q. Where was the conductor at the time these cars broke loose?

A. He turned around after I walked across to catch the car and went up towards the scale house.

Q. Up the track a piece?

A. He walked up towards the scale house, yes sir.

Q. Was he standing by you when you caught the car?

A. I walked off and left him there.

Q. Who was the first person that you saw after that?

A. The first person I saw I believe was Hurd, that I said anything to.

Q. What was he?

A. He was the assistant yardmaster.

Q. Where did you strike him?

A. At the scale house.

Q. Back up at the scale house?

A. Yes sir.

Q. How far is that from the scale house?

A. Where I got hurt?

Q. Yes sir?

A. Oh, it is—it is 25 or 30 car lengths.

Q. And you went up to him and told him that you wanted to get off?

A. No sir.

Q. Did you tell him you had gotten hurt?

A. Yes sir. I told him I got hurt down there when those cars ran together at number 9, and that I didn't seem able to make it.

53 Q. Didn't you tell him you were not feeling very well and wanted to quit that day?

A. No sir.

Q. As a matter of fact you were not feeling very well that day before you got hurt?

A. I don't remember as there was anything——

Q. You had been sick for several days had you not?

A. No sir, not that I remember of.

Q. Were you not complaining of a private disease there on that occasion?

A. No sir.

Q. Had you done got well of that?

A. I had not never had it.

Q. You had not had it?

A. No sir.

Q. And was not that the reason that you wanted to quit work, that you were suffering from that?

A. No sir.

Q. You had been telling the boys that you had it?

A. I told several that I thought I had taken a case of——

Q. You told them you thought that you had taken it?

A. Yes sir, that was along in September.

Q. So you were like the woman who said that you had had a chance, had you?

A. Well, if I had not had a chance I would not have been expecting a——

Q. Didn't it actually develop on you?

A. No sir.

Q. And ain't that what was hurting your back?

54 A. No sir.

Q. And didn't that hurt your bowels in here, too?

A. No sir; I never had anything wrong with me there; but I was scared; I thought I was taking a case of gonorrhea.

Q. Wasn't that the reason that you wanted to get off?

A. Oh no; that was in September when I thought I was taking a case.

Q. On this occasion when you went up and told Hurd that you wanted to quit, wasn't that the reason of it, and didn't you tell Hurd that you thought you had a case of that sort?

A. I never said anything about having a case at that particular time at all.

Q. You had done passed the dividing point at that time?

A. I was not sure I was not taking it then. That was about the 28th or 29th of September.

Q. Are you a married man?

A. Yes sir.

Q. How long have you been married?

A. I have been married 18 or 19 years. I have been married twice.

Q. At the time you got on this car you had not examined this engine any?

A. Not particularly only I knew it had been giving us trouble all the time for several days before that, it had been breaking loose.

Q. Had you examined the engine at any time?

A. Yes sir, I had looked at it because I kinder followed
55 the engine all the while I coupled to the cars.

Q. You told us awhile ago that these cars were loaded; how do you know they were loaded?

A. They had a mark for a load on the side is all the way I had of telling.

Q. All you knew about it was the mark on the car?

A. They were supposed to be loaded because they had a mark on it.

Q. They were supposed to be loaded because they had a mark on it?

A. Sure, yes sir.

Q. What was the mark on the car?

A. A 'B' was put on for Bristol.

Q. A 'B' was put on for Bristol?

A. Yes sir.

Q. That indicated that the car was what?

A. Was for Bristol.

Q. Would go to Bristol?

A. Yes sir. If it had been an empty it would have been an X and a B, an empty box for Bristol.

Q. All that you know about it was the mark; whether it was unloaded or loaded you don't know; you did not examine to see?

A. Of course I did not break the car open; I did not look into it.

Q. You don't know where the car had come from?

A. It had come from the West Division somewhere.

Q. You don't know where it came from?

A. Oh, I do not know the original point.

56 Q. The first you saw of it was on that day?

A. It came in there on the west end train.

Q. You don't know when it came; you never did see it until you went to get on it; you never saw it come in on any train?

A. No, but of course it was on a train.

Q. You don't know of your own knowledge where it did come from?

A. I never seen the car come in of course.

Q. When did you examine that track at number 9?

A. I was well acquainted with it; I knew the condition of it.

Q. When did you examine it, before this accident or afterwards either?

A. Why, I never made any special examination of it any more than the rest of the track there.

Redirect examination by Mr. GRIMM:

Mr. GRIMM: I understand you introduce these cards as evidence?

Mr. SMITH: Yes; you can use them in any way you want to.

Q. Mr. Crockett, what does V. & S. W. stand for?

A. Virginia and Southwestern Railway.

Q. Was that the road that you worked for up there as yard conductor?

A. Yes sir.

Q. I believe you say you got off on the 23rd of January to come down and get your wife?

57 A. Yes sir.

Q. You were asked why you quit. State whether or not while you were away from up there the Southern Railway took over the Virginia and Southwestern Railway?

A. Yes sir.

Mr. SMITH: Tell what you know about that.

—. ——.

Q. I will ask you whether or not you had a conference with Mr. Loyall the superintendent of the Southern Railway Company?

A. No, not with Mr. Loyall. I had a conversation with Mr. Deuel.

Q. That is the man I was thinking about; what position does Mr. Deuel hold?

A. He is superintendent.

Q. When did you have that conversation?

A. That was about the fourth of February.

Q. You were asked on cross examination why you quit. Tell the court and jury all about it?

A. My wife and I——

Mr. SMITH: He told that awhile ago.

Mr. GRIMM: No, let him answer my question.

Q. You tell the court and jury why you had to quit?

A. I came to Knoxville after my wife and baby to take them back home about the 23rd day of January, and was here until the fourth of February, and I was over in the office on the fourth or fifth of February, I cannot say which, and was in Mr. Deuel's office, and he came in and says——

Mr. SMITH: I object to any conversation with Mr. Deuel at that time.

58 Mr. GRIMM: I insist that he has made that question relevant by his asking this man why he quit.

Mr. SMITH: Let him answer why he quit. That is all he has got to do, just to tell why, and not what somebody said.

The COURT: He is objecting to his repeating what somebody said.

Mr. GRIMM: But it was the superintendent of this defendant company, and the only way he can tell why he quit is to relate the conversation.

The COURT: There is no proof here that he is superintendent at all; there is proof that he talked with somebody without proving his official capacity at all or his connection with the road.

Q. What position did Mr. Deuel hold with the Southern Railway?

A. Superintendent.

Q. At that time?

A. Yes sir.

Q. Did you go in to see him?

A. Yes sir, I was into his office over there.

Q. Please relate the conversation and tell the jury why you quit?

Mr. SMITH: I object to the conversation. He can tell why he quit.

The COURT: He can give it on the theory that he was an official of the defendant company.

59 A. I was in the office over there and he asked me how Bulls Gap was. I said all right. He says how are you getting along? I told him very well, I reckoned. He says I reckon you are aware of the fact that we took charge of the Virginia & Southwestern day before yesterday, I believe is the way he spoke it. I said yes, I saw an account of it in the newspaper. He says now, you can go back up there if you will sign a release, and he says if you don't, you cannot go back. I will see Mr. Simpson and get them to send you back up there probably.

Q. He said you could go back if you would sign a release, but if you did not sign a release you could not go back?

A. I could not go back.

Q. A release from what?

A. From being hurt October 15, 1910.

Q. This matter we are investigating now?

A. On the Southern Railway; yes sir.

Q. You did not sign the release?

A. No sir.

Recross-examination by Mr. SMITH:

Q. And that is the reason you quit?

A. No sir. He told me I could not go back up there, and of course there was not any use in me going. Afterwards I was up there and Mr. Hurd said he got a message not to work me any more.

Redirect examination by Mr. GRIMM:

Q. Are you suffering with a cough?

A. Yes sir.

Q. How long have you been suffering with it?

60 A. Something like 18 months I guess.

Q. Did you suffer with it before you were hurt?

A. No sir.

Q. How soon after you were hurt did it develop?

A. Four or five or six months; something like that.

Q. Is it continuous?

A. Yes sir.

Q. Is it getting better or worse?

A. It is getting worse it seems like.

Q. Tell us again what you were doing with those cars that you were on before you got hurt?

A. We were making up a train.

Q. You were making up a train for Bristol?

A. Yes sir.

Recross-examination by Mr. SMITH:

Q. Wait a minute. Let us see about that cough; where is that cough located, in your throat and lungs?
A. Across here (witness indicates region of lungs).
Q. You did not get hurt in your lungs?
A. No sir; I was never hurt in my lungs that I know of.

Witness excused.

61 Dr. C. A. SNODDY, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?
A. C. A. Snoddy.
Q. What is your profession?
A. The practice of medicine; superintendent of the Knoxville General Hospital.
Q. How long have you been practicing medicine?
A. Twelve years.
Q. How long have you been superintendent of the Knoxville General Hospital?
A. Two years.
Q. Two years. Just getting to the matter, state when you became superintendent?
A. October 15, 1910.
Q. October 15, 1910; that is two years ago today?
A. Yes sir.
Q. State to the court and jury whether or not D. E. Crockett was confined in the Knoxville General Hospital?
A. He was.
Q. When was he admitted?
A. October 16, 1910.
Q. Have you a record of his fluctuations while he was in there?
A. I have a bedside record of the case while he was in the hospital.

Q. Will you briefly state to the court and jury what that
62 record discloses?

A. It shows him admitted on October 16, 19-0, complaining of a headache, coughing some. On the following day developed an eruption over the body, some swelling of the skin particularly about the face and lips; headache continuing; pain in the abdomen, the lower part of the abdomen, considerable sediment in the urine that he passed, the eruption still continuing on the body, changed from a ward into a private room thinking possibly he had measles; in other words he was placed in isolation. On October 18 he complained of pain in his back, perspiring at night, urine still contains sediment. Had his bladder irrigated on October 20th.
Q. On what?
A. On October 20th he had his bladder washed out. During this time he had been having visits by Dr. Newman and by Dr. Miller.

Q. Does the record indicate he was packed in ice?
A. Yes, at the time I stated he had pain in his abdomen an ice pack was placed over his abdomen.
Q. Can you tell from the record how long that was continued?
A. That was commenced upon his admission to the hospital and it appears to have been discontinued on the 18th; he seems to have had the ice pack to his abdomen for two days.
Q. 16th, 17th to the 18th?
A. Complained of feeling dizzy in his head on the 21st, he was up and walking about on the 22nd having his back rubbed with liniment. On the 24th still complaining of pain in his back
63 and having it rubbed with liniment. On the 25th he had an ice pack re-applied to the lower part of his abdomen over the bladder. Complained of pain and swelling about his testicles and received treatment for it. Ice pack continued and treatment continued.
Q. What day was that, now?
A. The 26th. On the 27th the bladder washed out; a specimen of urine examined; the 28th the same treatment continued; the 29th the same continued; the 30th the same; on the 31st he was discharged from the hospital.

Cross-examination by Mr. SMITH:

Q. Doctor, what did that rash on his body indicate?
A. It looked as though he had measles.
Q. Was it a case of measles?
A. We put him in isolation as a safe-guard but afterwards decided it was not measles.
Q. What did you decide it was?
A. We thought it was most likely a rash due to medicine which we had been giving him.
Q. When was it you say he first began to complain of pain in his back?
A. On the afternoon of the 18th.
Q. Mr. Grimm talks about packing this man in ice; did you have him packed in ice up there?
A. We had an ice bag, a rubber bag, filled with ice laid on his abdomen.
Q. How big was the bag, what would it hold, about how much ice?
A. It was a round bag ten inches in diameter holding two
64 pounds of ice.
Q. And it was placed on his abdomen; was that a very painful operation?
A. No.
Q. It was rather soothing to the fever; the object of it was to reduce the fever, I presume?
A. To relieve his pain.
Q. Now, you speak of his having a swelling or complained of swelling in his testicles; what did that indicate?

A. That indicated there was an inflammatory process or there was some inflammation about the testicles.

Q. Caused by what?

A. It might have been caused by an injury or it might have been caused by a disease of those organs.

Q. What sort of a disease?

A. Any inflammatory disease.

Q. Gonorrhea?

A. It might have been caused by gonorrhea; that is a frequent cause of it.

Q. What did it look like; did it look like it was caused by that or by a blow on it; what was your medical opinion about it?

A. I did not examine him medically enough to give an opinion on that point. I was superintendent of the hospital and not the physician in charge of the case.

Q. Have you got a record of his temperature and pulse?

A. Yes; he was admitted with a temperature of 102 1/5 which during that day went up to 103 2/5; the next day the highest temperature was 103 2/5.

65 Q. I believe you say he was complaining of headache?

A. Yes sir, that was his chief complaint when he was admitted.

Q. When he first came it was headache, and when was it he developed this swelling of the testicles?

A. On the 21st of October.

Q. What did that sediment in the urine indicate?

A. I personally am not familiar with the character of the sediment enough to give an opinion. There are different kinds of sediment. It might indicate that he had rheumatism or it might indicate that he had inflammation of the bladder. Personally I did not examine it.

Q. Did you test the urine yourself?

A. Not myself.

Q. Does that record show what the urine test was?

A. No; there is no record here of the examination of the urine.

Q. Could that condition arise from gonorrhea?

A. Yes sir.

Q. Did you see any bruises on this man's back?

A. I do not recall any.

Q. Any bruises about his abdomen?

A. I do not recall any.

Q. Any bruises about him anywhere?

A. There is no record of any and I do not recall any.

Redirect examination by Mr. GRIMM:

Q. You were asked a moment ago whether the troubles which this sediment indicated could have been due to gonorrhea. State whether or not they could likewise have been due to personal

66 injuries?

A. They could have been due to an injury which interferred with the voiding of urine.

Q. Isn't it a fact that his urine had to be taken away from him when he came to the hospital?

A. There is no record of it showing that it had to be taken from him and I do not recall it.

Q. There is a record there that his bladder was washed out on different occasions?

A. Yes.

Q. What condition would a fever of 102 1/5 indicate?

A. It might indicate a great many things. All kinds of fevers are accompanied by an elevation of temperature, and inflammation of all kinds are accompanied by an elevation of the temperature.

Q. Is that an unusual temperature?

A. No, it seemed——

Q. That is, for a person that is well?

A. It indicates disease or injury of some kind. It indicates an inflammatory process going on. It is a high fever but not an unusual fever.

Q. What about the temperature of 103 2/5?

A. That is a high fever.

Q. That is a high fever; what does that indicate?

A. It indicates that the man is seriously sick.

Q. I believe you say that Dr. Newman and Dr. Miller attended him?

A. Yes, sir.

Q. Were they the Southern Railway Company's physicians?

67 A. Yes, sir.

Q. What if anything did Dr. Newman say to you about a concussion of the back?

Mr. SMITH: Let Dr. Newman tell that.

Mr. GRIMM: I submit, may it please the court, if he was the agent and the physician of the company, that what he admitted then would be competent now.

The COURT: I think it would be proper first to prove that by Dr. Newman, and then if necessary use this witness in rebuttal. As I understand, you could not prove Dr. Newman's statement by this witness unless it became necessary to do so.

Mr. GRIMM: Then I will excuse that subject; I will recall you later, Doctor.

Recross-examination by Mr. SMITH:

Q. I want to ask you if this trouble with his bladder would be attributable to the use of injections used in the treatment of gonorrhea, say silver or zinc?

A. As I remember his condition it is not likely to have been caused by it. It might possibly have been.

Q. What was the condition; it was an inflammation, was it not, in the neck of the bladder?

A. Yes. He appeared to have an inflammation about the bladder.

Q. Did you examine—what do you call that canal that leads into the bladder?

A. The urethra? No, I did not.

Q. You don't know what sort of process, of treatment,
68 had been going on in there?

A. No, sir.

Redirect examination by Mr. GRIMM:

Q. Gonorrhea is a disease of the extended portion of the penis, is it not?

A. Simple gonorrhea is.

Q. And it would be an extremely aggravated case that would affect the bladder?

A. Yes, it would be a complicated case.

Recross-examination by Mr. SMITH:

Q. You have seen lots of them, have you not, Doctor?

A. Yes, sir.

Redirect examination by Mr. GRIMM:

Q. And you say that his condition did not indicate that he had that?

A. I beg pardon?

Q. I believe you say that his condition did not indicate that he had that?

A. Did not indicate that he had a complicated case of gonorrhea?

Q. Yes?

A. No; I would say that I did not examine his condition carefully enough to make a positive—give a positive opinion on that, as I was not his physician—in charge.

Recross-examination by Mr. SMITH:

Q. I want to ask you something about the disease called gonorrhea; is that a serious disease?

A. The complications of it are.

69 Q. Will it cause a high temperature like 102 and 103?

A. When complicated, it will.

Q. Will it cause pains and swelling in the testicles?

A. It will.

Q. And headache?

A. When there is a high temperature it will cause headache.

Q. All of these symptoms that you have described this man as having, are symptoms that you find in the treatment of severe cases of gonorrhea?

A. They might be.

Q. Then in gonorrhea you find all these symptoms—high fever?

A. In complicated gonorrhea.

Q. That is what I am talking about?

A. Yes.

Redirect examination by Mr. GRIMM:

Q. Is there any record, anything on that record to indicate that he had a complicated case of gonorrhea or that he had any sort of a case of gonorrhea?

A. There is no positive indication of it.
Q. Who made that record?
A. The nurse who was attending him.
Q. What physicians were attending him?
A. Dr. Newman and Dr. Miller.
Q. They were the company's physicians?
A. Yes, sir.
Q. And they were treating him while that record was being made?
70 A. Yes, sir.

Witness excused.

Dr. C. E. LONAS, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?
A. C. E. Lonas.
Q. What is your age?
A. 38.
Q. And your profession?
A. Physician.
Q. For how many years have you been practicing your profession in Knoxville?
A. About 16 years.
Q. Do you know D. E. Crockett?
A. Yes, sir.
Q. How long have you known him?
A. I examined Mr. Crockett I think a year ago this October.
Q. How many different times have you examined him?
A. Twice I think.
Q. Please state to the court and jury what if anything you discovered on those examinations?
A. When I examined Mr. Crockett I found he had had peritonitis from some injury or disease. He gave me a history of an in-
71 jury, and he has a condition going on in the spinal cord from this same trouble through there like locomotor ataxia; those were the two most prominent features in his physical examination.
Q. What part of the back did you locate that injury in?
A. It is in the small of the back between the ribs and the hips.

Mr. SMITH: He did not say it was an injury; he said injury or disease.

Q. From the examination which you made, to what, in your opinion, is that trouble in the back—by what was it caused; to what is it due?
A. He gave me the history of an injury.
Q. What is your professional opinion as to the cause of it?
A. Well, that is my professional opinion. I did not see him hurt.
Q. I understand that. What else is he suffering from at this time?

A. He has a lung trouble.
Q. Are you able to state how long that has been in process?
A. He had it when I saw him first.
Q. Are you able to state in a general way how long it had been in process at that time?
A. No, sir, I would not be able to state.
Q. What is the nature of his lung trouble?
A. It is tubercular.
Q. It is tubercular?
72 A. Yes.
Q. Is it serious?
A. Yes, sir.
Q. State whether or not a tubercular trouble is more or less likely to set in where the patient had become debilitated or weakened?
A. Yes, sir.
Q. Now describe to the court and jury just how that is?
A. Well, he would be more likely to develop disease if he was in a weakened condition or if he was run down or injured.
Q. In what part of the body are the lungs?
A. Just about under the ribs; all over where you find the ribs you find the lungs under them.

Cross-examination by Mr. SMITH:

Q. When was it you treated this man?
A. October 1911 I examined him.
Q. In 1911?
A. Yes, sir.
Q. You found him at that time suffering with tuberculosis?
A. Yes, sir.
Q. Is that tubercular trouble altogether in the lungs, or is it?
A. Well, he might possibly have this tubercular condition in his bladder; I did not examine his bladder particularly, but he has had some trouble with it.
Q. At about the spinal cord?
A. The injury to the spinal cord, in my opinion, is the
73 cause of all this trouble; it is known as a trunk disturbance; or it is a lack of nourishment of the spinal cord itself, from some injury or disease.
Q. Is that trouble in his spinal cord tubercular?
A. Possibly so.
Q. Tuberculosis is a contagious disease isn't it; that is a disease that is contracted by——
A. Yes, sir.
Q. Your medical opinion that you give about the personal injury is based upon the history of the injury that you got from him?
A. Yes, sir.
Q. Without that history you could not fix that opinion and attribute it directly to a disease or injury or what?
A. No, sir.
Q. You would be without any basis to find out what caused it. In other words, in giving your opinion you depend upon the history that is given to you by the patient?

A. Yes, sir.
Q. You did not examine his bladder, I believe you say?
A. Not particularly.
Q. Doctor, is tuberculosis liable to follow in the wake of a serious case of gonorrhea that disturbs the system and debilitates the person?
A. No, sir, I would not think so.
Q. It is the debilitated condition of the person that makes him easier to contract tuberculosis, isn't it?

A. Yes, sir, a general debilitated condition would in-
74 fluence the development of it.

Q. It keeps a person in a condition where he is more likely to take any disease?
A. Possibly so, yes, sir.
Q. You do know that a severe case of gonorrhea has the effect of debilitating the health of the individual?
A. It might do so, yes, sir.
Q. Don't it do so; don't it always do it?
A. Gonorrhea is not a permanent disease; it is more or less temporary and it will run its own course.
Q. That is the general course of it; but sometimes it gets to be a very serious matter, does it not, Doctor?
A. It might, yes, sir.
Q. And affects the testicles and the whole urinary organs?
A. Yes, sir.
Q. Doesn't it get to be constitutional and affect the whole constitution?
A. Yes, sir, it would invade any structure that is not protected against it.

Redirect examination by Mr. GRIMM:

Q. Doctor, what would a fever of 103 2/5 degrees indicate?
A. You mean in this patient?
Q. Yes?
A. At what time? During his injuries?
Q. Well, say two or three days after he was injured, if he was injured at all?

A. A fever of 103 degrees would indicate that he had some
75 inflammation somewhere, some infection.

Q. Is that a high temperature?
A. Yes, sir. The normal temperature is about 98¼.
Q. And 103 2/5 would indicate that there was some inflammation?
A. Inflammation or infection.
Q. Or what?
A. Or some infection; one or the other, or both.

Recross-examination by Mr. SMITH:

Q. Suppose a person receives an injury to the back sufficient to set up a cause and be the producing cause of a disease such as this man had when you examined him. How soon after receiving that injury would he complain of the injury in the back?

A. How soon after?
Q. Yes?
A. Well, that would depend on the amount of force used in the injury or the amount of immediate destruction of tissue.
Q. If there was enough blow on the back to cause disease to set up?
A. Injuries to spinal cords develop very slowly; they are slow and progressive.
Q. If an injury comes from the outside, though, it has got to make some mark on the body, has it not?
A. Not necessarily. Men do have a concussion without even abrasing the skin.
Q. I know; but if there was a blow on the body that produces it, how soon after would he complain of the injury?
76 A. I would not be able to state how soon he would complain. It would depend on how bad he was hurt, the nature of his injury, the nature of the development after.
Q. If the fellow received a blow on the back sufficient to produce a disturbance in the spinal cord, how long would it take him to be complaining of it?
A. There is no definite period in which the thing might develop.
Q. When a fellow receives a blow on the back, if he is shoved over against a car and his back strikes a hard object, will it be two days before he begins to complain of his back?
A. It might be or it might be two months.
Q. Do you think it might be two months?
A. Yes sir, with a trunk disturbance which he has got, it is slow and progressive, and it is just now beginning to develop.
Q. Do you think a fellow can get a lick in the back and be two days before he will tell about it?
A. Yes sir.

Redirect examination by Mr. GRIMM:

Q. From the examination you made of this man, state to the court and jury whether he is in a physical condition to do manual labor?
A. I don't think so.
Q. State whether or not his tubercular trouble is curable or incurable?
A. He may get well of it; he may be years dying of it.
77 Men get well of tubercular troubles.

Recross-examination by Mr. SMITH:

Q. Did you ever have a lick on the back?
A. Not anything very serious.
Q. Did you ever have a light lick?
A. I suppose so.
Q. How long was it before you began to feel the lick?
A. I never had any injuries that I could use as a criterion.
Q. Did you ever have an injury on the back that it took you a month to find out whether you were hurt?

A. I have been fortunate enough not to have any injury of the spinal cord; I suppose you mean that.
Q. No, I mean a lick on the back?
A. I don't remember to have had any injuries that I could use——
Q. Did you ever hear of a man getting a lick in the back that took him a month to find it out?
A. Yes sir.

Witness excused.

78 Dr. WALTER LUTTRELL, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?
A. Walter Luttrell.
Q. Your age?
A. 44.
Q. Your profession?
A. Physician and surgeon.
Q. How long have you practiced your profession in Knoxville?
A. Seven years.
Q. Do you know the plaintiff D. E. Crockett?
A. Yes sir.
Q. How long have you known him?
A. I have known him since December first, 1911.
Q. Since December first, 1911?
A. Yes sir.
Q. State whether or not you ever examined him?
A. I examined him on December first, ninth and thirty-first, 1911, and on May 30th, 1912.
Q. Please state to the court and jury what condition you found him in?

Mr. SMITH: If your Honor please, I want to object to this testimony and also move to exclude the testimony of the physician that just testified on the same subject. This examination was
79 made over a year after this injury, and his condition then was too remote to be admissible.
The COURT: I think myself it is rather remote Mr. Grimm, unless you can connect it with the injury.
Mr. GRIMM: Just a word: If the testimony of Dr. Lones is not competent, then I don't know how to make evidence competent. Dr. Lones testified that in his opinion this man's present condition was wholly due to that injury in the back. If that don't make it competent, I cannot make it competent.
The COURT: On the theory of expert testimony you are offering it?
Mr. GRIMM: Certainly.
The COURT: Go ahead; let's get through with it.

Q. Go ahead and answer the question, Dr. Luttrell.

A. Well, I found that he had a chronic condition of the back, a thickening on the right side of the second and third lumbar vertebræ.

Mr. SMITH: Of what, Doctor?

The WITNESS: The second and third lumbar vertebræ.

Mr. SMITH: What was it you said?

The WITNESS: A thickening, a thickening of the tissues and muscles.

Q. Indicate on my back the portion of the back where that exists?

A. (Indicating.) Here and here. There is the first, second, third and fourth, and so on—lumbar vertebræ—the backbone.

Q. From the examination that you made, to what would
80 you attribute that injury?

A. The condition was attributable to some injury of the back.

Q. A blow or something like that?

A. Yes sir, some kind of external violence.

Q. What condition did you otherwise find Crockett in?

A. He had a cough, a temperature of 99 and a condition of his lungs there that would indicate he had some trouble.

The COURT: Speak a little louder, Doctor, please.

Q. Indicating what?

A. That he had a bronchitis, an inflammation of the bronchial tubes.

Q. What did his cough indicate to you?

A. Well, that he had a chronic inflammation of the bronchial tubes.

Q. State to the court and jury whether or not there was a soreness, if any, discoverable by you in Crockett's back when you made the examination?

A. There was tenderness.

Q. Tenderness there?

A. Yes sir.

Q. Doctor, what is the probable result of an injury of that sort to the spinal cord?

A. Well, it causes atrophy of the spinal cord. It is a condition that is incurable.

Q. It is incurable?

A. Yes sir. Injuries to the spinal cord never recover.

Q. I did not catch the last of your answer?

81 A. I say, injuries to the spinal cord are incurable.

Q. They are incurable?

A. Yes sir.

Q. From the condition in which you found Crockett, state to the court and jury whether or not he is in a condition to do manual labor?

A. Not at that time, no sir.

Q. You examined him how many times?

A. I examined him four times.

Q. Did his condition seem to improve or to get worse as you examined him from time to time?

A. First I examined him December, 1911, and May 30th, 1912, and his condition was practically the same.

Q. There was no improvement?

A. If anything a little worse.

Q. If anything a little worse?

A. (No answer.)

Cross-examination by Mr. SMITH:

Q. An injury to the spinal cord has a tendency to produce paralysis, does it not?

A. Yes, remotely, it may come on years afterwards.

Q. A direct injury to the cord itself will produce it immediately, won't it, if you had a direct injury to the spinal cord?

A. No; there can be so slight an injury that we call it concussion, it may be a very slight concussion, and then set up an inflammation which causes an atrophy, and that result you do not determine until afterwards.

Q. That is where the disease sets up in the spinal cord
82 and grows by degrees?

A. No. For instance, I could illustrate it this way: You could drop an egg this high (indicating) and it might addle it, and you would never know the difference until you tried to hatch it out; if you dropped it off of the table you would break it. That is simply a degree of injury.

Q. Whenever the spinal cord becomes affected, either by disease or injury, the spinal cord is a bundle of nerves that controls the muscles, does it not?

A. Yes, a system of nerve fibres and nerve cells.

Q. Yes.

A. Yes sir.

Q. And whenever they are disturbed some muscles are affected by it, whenever you get a lesion of the spinal cord you have got paralysis somewhere, have you not?

A. Not necessarily. You see there is a motor function and a sensory function.

Q. You have got a paralysis of the nerve that is affected by the lesion in the nerve, have you not?

A. You may have a lesion in the nerve and get nothing but an intense burning in the bottom of it, but no paralysis.

Q. It affects it in some way?

A. Yes.

Q. It affects the operation of the nerve and nerve supply, and therefore the muscle that is supplied by that nerve, if it happens to be a motor nerve, it is affected?

A. If a motor nerve is affected, it affects the muscles; if it is a sensory nerve——

Q. This whole condition might be due to disease without
88 any traumatic influence at all, might it not?

A. A condition of the spinal cord might be, but then the

condition of the muscles of the back could only be caused by injury.

Q. You are basing your opinion largely on the history of the case that you got from the patient, I take it?

A. No sir.

Q. How is that?

A. No sir. If he came to me, I could tell him he had an injury even if he did not tell me.

Q. Was it a severe injury that he had or a slight injury?

A. Well, I judge it must have been rather severe that would cause those symptoms.

Q. Was it such an injury as would have produced any pain at the time?

A. Yes, it should have, I judge.

Q. Was it the kind of an injury that a fellow would know about before two days after it occurred?

A. Yes sir, he should.

Q. Now, Doctor, what are the tendencies of chronic gonorrhea with reference to the general health of an individual?

A. Why, the tendency of gonorrhea is to cure itself; if it was not everybody would be bad off.

Q. How is that?

A. I say, the tendency of gonorrhea is to cure whether treated or not; if it was not, everybody would be bad off.

Q. Gonorrhea becomes chronic, does it not?

A. When gonorrhea becomes chronic, we call it gleet.

84 Q. Well, it affects the constitution frequently, does it not, Doctor?

A. No sir.

Q. You never have constitutional gonorrhea in your practice?

A. It is the rarest thing in the world.

Q. You do have it, don't you?

A. Occasionally, yes, gonorrheal rheumatism, but I never saw a——

Q. What effect does a case of gonorrhea have on the temperature?

A. It would have no effect at all—pure gonorrhea.

Q. Would it not have a tendency to increase the temperature?

A. No sir, it is only when we get a mixed infection that we have the temperature.

Q. Suppose you have got an inflammation of the organs involved in gonorrhea, does that have a tendency to increase the temperature any?

A. Yes, that would, but that is when it is mixed with other bacteria, not gonorrhea germs alone.

Q. I am not talking about one of these cases that gets well in three days?

A. There are not any cases that get well in three days.

Q. I saw an advertisement to that effect the other day.

A. Well, but that——

85 Redirect examination by Mr. GRIMM:

Q. Doctor, what condition would a temperature of 103 2/5 indi-

cate in a patient in a hospital within two days after he sustained an injury such as Crockett seemingly sustained?

A. Well, it might indicate he had peritonitis.

Q. Indicating what?

A. That he might have peritonitis.

Q. What is that?

A. That is an inflammation of the covering of the abdomen. It indicates he has got some inflammation—temperature does.

Q. Is that a high fever?

A. Yes, moderately high.

Witness excused.

JACK YEAGER, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. How old are you?

A. I am thirty years old.

Q. Do you live in Knox County?

A. Yes sir.

Q. What is your occupation?

A. Switching on the yards.

Q. Do you work for the Southern Railway Company?

A. Yes sir.

Q. Do you know the plaintiff D. E. Crockett?

86 A. Yes sir.

Q. Do you remember when he worked for the Southern Railway Company in October, 1910?

A. Yes sir, I was working that day.

Q. Do you remember the switch engine that the crew was using with which he was connected?

A. Yes sir, I was on the same crew he was that day.

Q. How?

A. I was on the same crew he was.

Q. State to the court and jury whether or not the coupling on that engine was such that it remained coupled or came uncoupled?

A. I just think it was—I don't know, but I think it slipped out.

Mr. SMITH: If you don't know, don't tell what you think.

A. (cont'd). Well, that is all I——

Q. Tell what you know.

Mr. SMITH: If you don't know, don't tell it; we can all guess.

A. Well, all right. It had been coming uncoupled, that is just slipping out, you know. With the switch engine running, it just works up and down it slips out sometimes. Most any switch engine does.

Q. What causes it?

A. I reckon it was on account of the track.

Mr. SMITH: Don't reckon about it; if you don't know, don't guess.

Q. How wide are the draw bars?
87 A. They are about eight inches.
Q. Eight inches?
A. Yes sir, about eight inches as well as I remember.
Q. What was the condition of track number 9?

Mr. SMITH: When is it you are asking about now?

Q. In October, 1910?
A. Well, it was pretty—it was kinder rough along then; it was kinder rough then.
Q. What do you mean by rough?
A. There were low joints in it like, kinder low joints.
Q. What would be the effect of a car wheel striking a low joint if the other end of the car was on a solid foundation?
A. Running on low joints, the car would be low and the ends would be up, and it would work up or down.
Q. It would throw it up or down?
A. Yes sir.

Mr. SMITH: Don't tell him.

Cross-examination by Mr. SMITH:

Q. How long have you known this man?
A. I have known him about eight years.
Q. Eight years. Have you worked with him and been about with him?
A. Why yes, I have been—I have known him ever since I came to Knoxville.
Q. Did you have any talk with him about the time this accident occurred?
A. No sir.
Q. How long had it been before that that you had seen
88 him?
A. I had been working with him, is about all.
Q. Up to that time?
A. Yes sir.
Q. Did he tell you anything about having a case of gonorrhea?
A. No sir, not that I know of; I never heard him say anything about it, only just working with him there, out on the yard.
Q. Did he not tell you anything about having a case of gonorrhea?
A. No sir, not a word about it, I never heard anything about it at all.
Q. Did he tell you anything about it after the accident?
A. No sir, I never heard anything said about it.
Q. Are you acquainted with his general character?
A. No sir, I am not so awfully well acquainted — him.
Q. How?
A. Only when I am working.
Q. I mean his general reputation among the people that he associates with?
A. No sir, I don't believe I do.

Q. You have been knowing him for eight years?
A. I have known him, I mean since I have been on the yard at work; he is a pretty good sort of a fellow, is all I know; I took him to be a pretty good sort of a fellow on the yard.
Q. A good sort of a fellow on the yard?
A. Working; that is about all I——
89 Q. What do you know about his reputation, his standing among the people that he associates with?
A. Why, I thought it was pretty good, is the only thing I know.
Q. I say, what do you know about it?
A. I don't know anything much about it, just to tell the truth about it—I don't think——

Witness excused.

D. S. SNYDER, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. Your age?
A. 43.
Q. Your occupation?
A. I am clerking in a soft drink stand now.
Q. Were you ever a railroad engineer?
A. Yes sir, I have railroaded here.
Q. Are you acquainted with the Southern Railway Company's yards at Coster?
A. Yes sir, I am pretty well acquainted with them.
Q. Do you know where track number 9 is?
A. Yes sir.
Q. State to the court and jury whether that track was in good or bad condition, if you know, on or about the 15th day of October, 1910?

90 Mr. SMITH: I object to the question in that form.
Mr. GRIMM: I asked him, if he knew.
Mr. SMITH: Track number 9—this accident did not occur all over track number 9.
The COURT: Confine your question to a certain part of the track.

Q. I will indicate as nearly as I can by saying one-third from the upper end?

A. I cannot tell you, because I have not been in the yards, since December 1907.
Q. You have not?
A. No sir.

Witness excused.

JOHN GODFREY, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. Your name is John Godfrey?
A. Yes sir.
Q. What is your age?
A. I am 34.
Q. Do you live in Knox County?
A. Yes sir.
Q. State whether or not you worked for the Southern Railway Company?
A. Yes sir, I am working for the Southern Railway Com-
91 pany.
Q. Now?
A. Yes sir.
Q. Do you know D. E. Crockett?
A. Yes sir.
Q. Do you remember when he worked for the Southern Railway Company?
A. Yes sir.
Q. Are you acquainted with track number 9 in the yards at Coster?
A. Why, I go through there when they pull a train through there sometimes. I am on the road all the time now.
Q. Were you in the yard in October, 1910?
A. Yes sir.
Q. Were you in the yard?
A. Yes sir. No, I was not in there in ten; I was on the road in 1910.
Q. Were you about the yards?
A. When they pulled a train in there, is all.
Q. Do you know where track number 9 is?
A. Yes sir.
Q. Do you know engine number 649, switch engine?
A. Yes sir.
Q. If you know state to the court and jury what the condition of track number 9 was about one-third of the way down from the upper end at that time?

Mr. SMITH: Wait a minute; at the time this man got hurt.

92 Q. October 15, 1910?
A. I don't know the time he got hurt; I don't know the day he got hurt; I did not know it for some time after they claimed he got hurt.
Q. What was the condition of that track two years ago, about that?
A. In some places it had low joints like all other tracks have.
Q. What do you mean by "low joints"?
A. Where it is loose underneath and drops down, up and down.
Q. Some parts of it will give?
A. Up and down, yes sir.

Q. State whether or not there was a marshy place on track number 9 about the place I have indicated?

A. Yes, in some places it is a little marshy along there.

Q. What would be the effect of that if an engine or cars ran over it?

A. When the engine goes over it, it dips up and down.

Q. Up and down. If one end of a car would strike a low place, what would be the effect on the other end of a car on a solid place?

A. It is owing to how bad the place was.

Q. Would it have a tendency to throw one end up and the other end down?

A. It would drop up and down a little bit; it is owing to how big the place is.

93 Q. How wide are the draw bars of the knuckles on those cars?

A. How wide?

Q. Yes, how much dip do they have?

A. They don't have very much.

Q. How much?

A. Some of them has more than others. Some of them has got as high as two inches or more.

Q. I mean the knuckle itself, how wide is it up and down?

A. It is supposed to be nine inches.

Q. It is supposed to be nine inches; if they fit perfectly there is a nine inch grip; is that right?

A. Yes sir.

Cross-examination by Mr. SMITH:

Q. (Indicating on chalk drawing.) We will say this is the lead down here, number 10 running along there and here is number 9 running off along down here. On the 15th of October, 1910, were there any low joints running along here; could you say that?

A. I don't know that. When I passed in there with a train sometimes we would pull a train up through there——

Q. You don't know when that would be?

A. No sir.

Q. That marshy place that you talk of, do you know where that is?

A. There was one there, but I could not say——

94 Q. Is it anywhere along here about number 9, coming down from the lead?

A. There was one along there, but I could not say right where it was.

Q. You don't know whether it affected number 9 track or not?

A. No sir.

Q. You don't know whether it did or not. Now this track here is a switch track, is it?

A. Yes sir.

Q. This is the main lead?

A. Yes sir.

Q. You say you were on the road about the time he got hurt?

A. Yes sir.

Q. Have you ever worked on the yard with him?
A. I stayed on the yard two years and a half with him.
Q. With Crockett?
A. Yes sir.
Q. Along about this time, did you ever hear him make any complaint about having a dose?
A. I never heard a word, I did not know that he was crippled up for about a month or two after they said he was; I did not know it.
Q. Did you ever hear anything from him about having a case of gonorrhea along about that time?
A. I never did hear a word said about it.
Q. You did not talk to him about it?
A. No sir.
95 Q. Do you know this man's character, general reputation?
A. No sir; I have worked with him is all I know anything about him.
Q. You have worked with him?
A. I have worked with him.
Q. Could you say what the estimate is in which he is held out there by the men that he works with—his character and standing?
A. No sir.
Q. You don't know that?
A. I just go on and work and go home and attend to my business. I don't ask a man no questions.
Q. You worked with him how long?
A. I stayed there in the yard two years and a half.
Q. How long have you been knowing him?
A. I have been knowing him I guess for ten or twelve years.
Q. Did he ever live here in Knoxville?
A. He boarded here I think part of the time.
Q. Did you live near him?
A. Yes sir, I boarded—I lived in Lonsdale.
Q. Did you live near him?
A. No sir, I don't know where he boarded.
Q. You don't know what his general reputation is then?
A. No sir.

Witness excused.

96 TOM L. GAMMON, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?
A. T. L. Gammon.
Q. Where do you live?
A. I live #1508 North Central Avenue.
Q. How old are you?
A. I was 50 years old the fourth day of last May.
Q. Were you ever employed by the Southern Railway Company?
A. Yes sir.
Q. Did you work about the Coster shops out here?

A. Yes sir, I worked for the Southern Railway Company and the East Tennessee Virginia & Georgia Railway Company and the Knoxville & Ohio Railroad Company about eight and one-half years.

Q. When did you sever your connection with the Southern?

A. The last day I worked with the Southern was in the year 1911, May the 7th.

Q. Do you know track number 9, at Coster?

A. Yes sir.

Q. Do you know switch engine number 649?

A. Yes sir, I worked on that engine.

Q. You were an engineer, I believe?

A. No sir, I was a switchman, that is my last service; I was assistant yardmaster when I resigned under the East Tennessee
97 Virginia & Georgia Road.

Q. State if you know whether or not switch engine 649 frequently become uncoupled from the cars out there in the yards?

A. Why not necessarily any more than any other engines I worked on. I worked on a number of engines on the hill.

Q. When you speak about the hill, do you mean the yards?

A. I mean the yards, that is the hill, the yards.

Q. Are the yards on a grade?

A. Yes sir, the yards are on a grade.

Q. What was the condition of those yards and especially track number 9 two years ago today?

Mr. SMITH: I object to the question in that form if your Honor please.

The COURT: Confine him to the particular locality of the accident.

Q. What was the condition of track number 9 about the time that Crockett was hurt out there two years ago one-third of the way approximately from the upper end down?

Mr. SMITH: I object to that; he has got to show this occurred one-third of the way down.

Mr. GRIMM: The plaintiff swore that as nearly as he could say it was about one-third of the way down. I cannot take this witness out there and point him out the place where this man was hurt, and no other human being under the sun; I don't suppose Crocket could do it himself.

Mr. SMITH: The plaintiff testified that this car struck the
98 other car three or four car lengths from where he got on it, and he got on in the clear of number 10; and it is perfectly easy to locate the point where that accident occurred within a car length or so.

The COURT: It is necessary to confine this proof to the particular part of the track that may or may not have caused this accident. Any part of the track, however defective it may have been that these cars did not pass over, would not be responsible for that accident.

Mr. GRIMM: I concede that is true.

The COURT: For that reason it ought to be confined to the part of the track immediately involved.

Mr. GRIMM: I will as nearly as I can, but I cannot point out the exact spot.

Q. Do you know where track number 9 leaves 10?

A. Yes sir.

Q. Can you tell the court and jury what the condition of track number 9 was about nine or ten car lengths from the junction of track 10, up there two years ago?

A. The condition of the track was what we—the way we understand it as railroad men—of course in working over those different tracks sometimes we would run off and tear up the track with cars and sometimes we would be handling bad ordered cars and tear the track up, but ordinarily I considered that the tracks were in very good condition.

99 Q. Were the cross ties solid?

A. Well, as far as I could see they were solid, because they were covered up with cinders.

Q. Was there a marshy place there?

A. Sir?

Q. Was there a marshy place there?

A. I don't remember of any marshy place.

Q. You don't remember?

A. No sir, I don't remember.

Q. Did you make a special examination of the track about that time?

A. I will not say that I made a particular examination of the track at that time, but I worked all over these tracks, I worked all over them.

Q. Were you working in that yard at that time?

A. Yes sir, I was working in the yard at that time; that was about the 10th of October, 1910? Yes sir, I worked there.

Q. Can you point out to the jury where that marshy place was?

A. No sir; if there was any marshy place I do not know anything about it, no sir.

Q. Did you use engine 649?

A. You see I worked some days, I would work on this engine, the next day I would work on 621 and 437 and different numbers of engines that worked at different jobs, they had different numbers and I was working as an extra man, and so we might work on what we might call the empty side today and tomorrow night we would

100 work on the loaded side, and the next day we would work on the hammer track.

Q. How wide are the knuckles on the draw bars, the knuckles that catch each other?

A. How wide?

Mr. SMITH: He means how high.

A. Yes sir. Oh, about—I will have to kinder guess at it.

Q. Don't you know?

A. I don't know personally, but it seems to me like it is about six inches. Some might be a little wider than others.

Q. You don't know what the width is?
A. Sir?
Q. You don't know what the width is?
A. Just personally I don't know; I never had occasion to measure it, but just guessing at it, I am giving my judgment.

Cross-examination waived.

Witness excused.

Court adjourned until one thirty o'clock p. m. at which time same resumed pursuant to adjournment.

W. C. HENDERSON, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your age?
A. Sir?
Q. What is your age?
A. 23.
101 Q. Where do you live?
A. I live at Lonsdale.
Q. State whether or not you worked for the Southern Railway Company as a switchman in the yards at Coster in October, 1910?
A. Yes sir.
Q. Tell the court and jury what the condition of track number 9 was towards the upper end where it joins number 10 say one-third of the way down?
A. Well, it seems like it was a pretty bad track that was there; I never paid much attention to it.
Q. What was the matter with it?
A. Well, it seemed to me like there was some low joints in there; I could not say for I did not pay much attention to it.
Q. How high are the knuckles on the draw bars?
A. How high?
Q. How high up and down?
A. Do you mean how wide they are?
Q. Yes?
A. I don't know; I could not answer; it looks to me like they are from eight to ten inches to my best knowledge; I don't know what they are; that is what I think about it.

Cross-examination by Mr. SMITH:

Q. You say you never paid much attention to the track?
A. No sir, I never paid much attention to them; I did not have time.
Q. Your business was what?
A. My business was switching—running cars.
102 Q. Now, this track number 9, that joins right into the main lead, does it?
A. Yes sir.

Q. What sort of a condition was this track in here along the lead; did you pay enough attention to know whether there was anything wrong along there?

A. No sir, I did not pay much attention to it; it has been so long I have forgotten about it; I did not pay much attention to it at all.

Q. Did you see any low joints along here about where the tracks come together?

A. No sir, I never seen any along there.

Q. How far down was it before you saw any low joints?

A. Kinder about one-third, something like that.

Q. About one-third?

A. Yes sir.

Q. How long is that track?

A. I don't know how long it is.

Q. About how many cars will it hold; forty cars, won't it?

A. I don't know; I guess it would.

Q. Something like forty cars; that would be down then about thirteen or fourteen car lengths from where you were?

A. I could not say for certain; I did not notice exactly how many.

Q. That is your best judgment of it, about forty?

A. Yes sir.

Q. And your judgment is down here about one-third of
103 the way of that track there were a few low joints down there, the best you could tell?

A. The best I could tell.

Q. In passing over it?

A. Yes sir.

Q. That is on the cars?

A. Yes sir. Well, I looked for them coming up there, and it looks to me like there were some few joints loose there.

Q. If it would hold forty cars, that would be ten or thirteen car lengths down here where you noticed the low joints?

A. Yes sir, something like that.

Witness excused.

FRED SIMPSON, the next witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. What is your name?

A. Simpson.

Q. What is your age?

A. 34 years old.

Q. Where do you live?

A. I live on Oklahoma Avenue, Knoxville, Tennessee.

Q. What is your occupation?

A. Round house foreman.

Q. Are you the roundhouse foreman for the Southern Railway Company?

104 A. In the daytime, yes sir.

Q. You were summoned to bring with you all the engineer's reports for engine number 649 for each day and night for the month of October, 1910, 63 in number?

A. Yes sir.

Q. Did you bring them?

A. No sir.

Cross-examination by Mr. SMITH:

Q. You say you were summoned to bring a lot of records with you?

A. Records, yes sir.

Q. Why didn't you bring them, Mr. Simpson?

A. In the first place the work-reports were taken out of the roundhouse at the end of each month and sent to the master mechanic's office; and if you will all remember, in 1910, there was a fire at the master mechanic's office, and the work-reports of all engines in 1910 were destroyed.

Q. By fire?

A. By fire in the master mechanic's office. In the first place there is no copy of work reports made in the engine roundhouse during the day of any month——

Q. Do you remember whether this engine 649 had been repaired in any respect shortly before this man Crockett claims to have got hurt?

A. I don't know; I would not be positive. The reason we have no work-reports on those engines is, the engine works day and night, and we only take them in once a month unless something breaks about it, and it is done right now; the engine crew generally waits until it is repaired and it is gone again with the same crew.

105 Q. Do you know that engine 649?

A. Yes sir.

Q. How was it, its draw bars, the heighth of the draw heads?

A. As far as I know they were all right.

Q. What was its height; was it standard height?

A. They were supposed to be standard, yes sir.

Q. What about the draw head being too low or too high?

A. I don't know a thing about it: I don't know whether it was or was not.

Q. Do you remember any occasion for having to raise or lower it after this accident?

A. I don't recall any, no sir.

Q. Its original construction was a standard height?

A. Yes sir.

Q. What is the standard height?

A. Something like 31 to 34 inches or 31½ to 34 from the top of the rail up to the center of the drawhead.

Q. 31 to 34 inches?

A. Yes sir, something like that (indicating), what that is.

Q. These knuckles work in the drawhead, don't they?

A. Yes sir.

Q. How do they work when the cars are coupled; how are they fastened with these knuckles?

A. They are supposed to be fixed to lock; what we call a lock; I have got no drawing of it, but one knuckle works on a hinge or through a pin, and drops in there, and there is a lock comes
106 down by the side of it; in order to uncouple it you have to raise the lock or pin, and that lets the spring out.

Q. Is there a standard height of these same drawbars on cars?

A. I don't know about it; it should be about the same thing.

Q. What is the standard?

A. I don't know what the standard is; I do not deal with the cars; I do not have anything to do with that.

Q. You just handle engines?

A. Yes sir.

Q. The knuckles sorter of hook into each other like that (indicating) when they are coupled together, and when they are uncoupled they are separated?

A. Yes sir.

Redirect examination by Mr. GRIMM:

Q. How high do you say the knuckles were?

A. They are supposed to be from 31½ to 34 inches.

Q. No, I mean the middle part; how high is it where they grip?

A. That is what I have reference to, the center of the knuckle to the top of the track is from 31½ to 34 inches; we call that a standard height.

Q. I understand, but you don't catch my question. The question is, the knuckle where it clutches, how high is that?

Mr. SMITH: What is the length of the coupling itself?
107 A. What is the width of the coupler?

Q. Yes, sir?

A. Something like six inches space; I could not be positive, but it is something like—I guess it is six and one-half or probably seven inches. I cannot be positive about it.

Q. That is the smallest knuckle?

A. They are supposed to be the same length.

Q. You don't know what condition this engine was in?

A. I do not, no, sir.

Q. You don't know what the condition of the cars is?

A. I don't know anything about the cars, no, sir.

Q. The engineer when he turned in the engine at night was required to make a report showing anything that is wrong with it, is he not?

A. If he turns it in, he does.

Q. The engineer that turns it in in the morning is required to do the same thing?

A. Not on working a night and day shift, they don't turn the engine in when they are working the engine night and day.

Q. The engineer that comes off of a morning is required to do the same thing as required by the rules of the company for the night man, is he not?

A. He turns it over to another man.
Q. Is he not required to make a report of it?
A. Not unless there is something wrong with it.
Q. Who took those work-reports out of the roundhouse; did you do it?

A. No, sir; the day force did that. I worked in the night
108 time.

Q. When this subpœna was served on you, did you ever search for the reports?
A. I did.
Q. Did you personally go there?
A. No, sir, I sent my clerk up there, and he stayed half a day.
Q. You did not look at all?
A. No, sir.

Mr. GRIMM: I ask that his evidence as to those reports being lost or destroyed be excluded upon the ground that his evidence is hearsay.

The COURT: His testimony upon that particular point would not be competent; because he is testifying as to what somebody else did, and of course that matter could be proven by that person.

Recross-examination by Mr. SMITH:

Q. You do know that the master mechanic's office where these records were kept was burned up?
A. I do; I was there at the time.
Q. That was the place for keeping these records that you speak of?
A. Yes, sir.

Redirect examination by Mr. GRIMM:

Q. But you did not put them there?
A. No, sir.
Q. And you do not know of your own knowledge that they were put there?
A. I do not.

Witness excused.
Plaintiff rests.

109 *Defendant's Evidence.*

B. V. MOORE, the first witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. Is your name B. V. Moore?
A. Yes, sir.
Q. Do you know Mr. Crockett here, the plaintiff?
A. Yes, sir.
Q. Were you working out at the Coster yards for the Southern Railway Company at the time he claims to have been injured out there in October, 1910?

A. Yes, sir.

Q. Had you known Crockett before that?

A. Yes, sir.

Q. I will get you to state whether or not about the time he claims to have been injured he was suffering with any disease that you know of?

A. Well, he told me that he contracted a case of gonorrhea, a short time before he was supposed to have been hurt.

Q. Did he appear to be suffering from it?

A. Well, he said it had just started on him, had not gone very far, was not suffering much, but it had shown up good and plain; he was sure he had it all right enough.

Q. What did he say he was doing for it?

A. Well, he said that some person had advised him to take a nick*le*'s worth of sulphate of zinc and put it in a quart of
110 water and wash his penis with that—syringe it.

Q. Did he say he was going to do that?

A. He left that impression on my mind, he was going to follow the person's advice.

Q. Do you know whether he got better or worse after that?

A. Well, I only know what I have heard about it; I never——

Q. I want to know what you know from him?

A. I did not talk with him after that at all; I did not have any talk with him about the matter.

Q. What was his behavior there as to whether he appeared to be well or sick or how did he do about his work?

A. I was working at night and he in the day time; I did not see him but very—I don't recollect how long it was after that until I saw David.

Q. Did you see him at night?

A. Yes, sir, I saw him at night; I was working at night at the time I had this talk with him and he in the daytime; I did not come in contact with him in his work at all.

Q. Was he working at the time you saw him?

A. No, sir, he had been laying off, up at Bristol or Johnson City I believe he said it was.

Q. Was that the trip he caught the——

A. He claims he caught the gonorrhea on that trip, they had a Carnival of some kind at Johnson City, some kind of a hurrah up there, and he got mixed up with some sort of a woman up there and that was the result of it.

111 Q. Had he been indulging on that trip in other ways besides——

A. I could not say after that, for I was not with him.

Q. Well, what was his appearance at the time you saw him?

A. Well, he generally always has the appearance of having been dissipated some, but he left the impression upon my mind that he had been up against it, having a kind of a toot or a little drunk, for instance.

Q. Are you acquainted with his general character?

A. Well, I am pretty well acquainted with it.

Q. Is that character good or bad, Mr. Moore?

A. It is not good.

Q. Well now, judging from his character, is he a man entitled to full faith and credit on his oath in a court of justice?

A. I would not think so.

Q. Do you know these tracks out there; did you work out there in these same yards?

A. Yes, sir.

Q. Do you know where number 9 and number 10 come together?

A. Yes, sir; number 9 and number 10 is the first track in that lead, the last track in the lead going one way—the first going one way and the last the other; number 10 in other words is the extension of the lead.

Q. Now, at that time, what was the condition of those tracks along there where they come together along down this way?

112 A. You mean at the junction of the tracks?

Q. Yes, at the junction of the tracks?

A. Well, the lead has always been in my experience the best tracks in the yard. It is a track that all cars and all engines pass over every day and a great many times a day, and they have heavier steel and better cross ties and better ballast and so on on the leads than they have in any other part of the yard.

Q. Do you know just where this accident occurred, where the cars broke loose on that occasion?

A. No, sir, I was not there in the daytime. I only know from hearsay.

Cross-examination by Mr. GRIMM:

Q. You are working for the Southern Railway Company?

A. Yes, sir.

Q. What sort of a job have you got?

A. Well, I am supposed to be a switchman; I was lining up switches at that time.

Q. What sort of a job have you got now?

A. Pretty much the same job; lining up switches.

Q. How long have you been with the Southern?

A. Well, I have been with the Southern off and on for 25 years.

Q. How many cases have you been a witness in for the Southern?

A. One, I think.

Q. Is that all?

A. That is all, all I can recollect of. I was a witness in Anderson County one time about 20 years ago.

113 Q. How high are the knuckles in the drawbars?

A. I never measured a draw bar from the ground up.

Q. I don't mean that, I mean the grip; how much grip do they have?

A. Well, I should say a knuckle has probably eight inches surface; I think it is eight or nine.

Redirect examination by Mr. SMITH:

Q. Do you belong to the same sort of a trainmen's union?

A. Yes, sir, I belong to the Brotherhood of Trainmen.

Q. Did this man belong to the same lodge?

A. Yes, sir.
Q. Do you know whether or not he made application for benefits under that organization's rules?
A. I think he did; yes, sir.
Q. Do you know whether he got them or not?

Mr. GRIMM: I object, your Honor.
Mr. SMITH: I will withdraw that now.

Recross-examination by Mr. GRIMM:

Q. Did you fix Crockett some medicine for his corn?
A. I may have prescribed for him.
Q. Are your a physician?
A. No, sir.
Q. When did you have these conversations with Crockett you have testified about?
A. It was a short time before he met with this accident.
Q. How long before?
A. Oh, a few days, not many.
Q. What day did you have it?
114 A. What day?
Q. Yes?
A. I am not able to say what day; it was at night.
Q. What month did you have it?
A. How is that?
Q. What month did you have it?
A. Well, it was only a few days before the accident that happened to him.
Q. What month was he hurt in?
A. I am not sure about that.

Witness excused.

E. R. MOORE, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business, Mr. Moore?
A. Yard clerk.
Q. Where?
A. At Bulls Gap.
Q. For the Southern Railway Company?
A. Yes, sir.
Q. Were you at work up there at the time—do you know where this man Crockett was at work?
A. Yes, sir.
Q. Were you at work up there at the time he was working in December, 1910, and January, 1911?
A. Yes, sir.
115 Q. What sort of work was he doing up there?
A. He was night yard conductor on the yard.
Q. What did he have to do?

A. He had to oversee a crew up there, of a switch engine, and handle the two switchmen.
Q. Is that hard work or easy work?
A. Well, I don't know; I never handled anything like that.
Q. What did he have to do?
A. He had to make up the trains, switch them.
Q. Couple and uncouple cars?
A. Yes sir, he generally does the cutting and the switchmen does the riding of the cars.
Q. Do you know anything about how he came to quit work up there?
A. Yes sir.
Q. At Bulls Gap?
A. Yes sir.
—. ——.
A. He came to work down there one night and I supposed he was drinking and——
Mr. GRIMM: Don't tell us what you supposed; tell us what you know.
Mr. SMITH: Yes, tell what you know about it.
A. (cont'd.) Well, he was drinking, and he came in the office there, him and the yard clerk too, Robinson, both of them were drinking, so he went—he left out of the office about nine o'clock and his train came in there over the Virginia & Southwestern to
116 be switched, I went and marked the train for that clerk, he was not able to mark it, he was drinking, and so when the train was to be switched I could not find Mr. Crockett anywhere, so the yard engine stood there for about two hours, and I did not know where he was at to look for him, could not find him, so the engineer he went down and told the yardmaster, G. M. Hurd——
Mr. GRIMM (interrupting): Were you along?
The WITNESS: No sir.
Mr. GRIMM: I object, your Honor.
Mr. SMITH: You need not tell what occurred down there.
Q. You saw him there in the yard office?
A. Yes sir; and he left out and I did not see him any more until the next morning about six o'clock.
Q. Was he discharged?
A. No, he was not then.
Q. How is that?
A. He was not then as I know of.
Q. When was he discharged, if he was at all?
A. That was the last night he worked.
Q. Are you acquainted with his character?
A. No sir, I did not know the man until I went there.

Cross-examination by Mr. GRIMM:

Q. You are working for the Southern Railway?
A. Yes sir.
Q. How long have you worked for them?

A. Since February third, 1911.

Q. You don't know how Mr. Crockett happened to loose that job up there, of your own knowledge?

117 A. Well——

Q. Of your own knowledge I am asking you?

A. Well, on that night that they could not find him, they sent another man—they sent the agent Pitts out there to work the yard when they could not find him; that was the last night I know of him working.

Q. What night was that?

A. I don't know the date; I have forgotten the date.

Q. What month was it in?

A. In January.

Q. What part of January?

A. Well, along—it was between the 10th and 12th and last of the month, sometime, I couldn't say just what date.

Q. Who was operating that railroad then?

A. The Southern was operating one, and the Virginia & Southwestern the other.

Q. When did the Southern take over the Virginia & Southwestern?

A. They taken hold of the yards the third day of February.

Q. The third day of February?

A. Yes sir.

Q. That was while Mr. Crockett was off?

A. How is that?

Q. That was while Mr. Crockett was off?

A. I don't know anything about that.

Q. You stated a moment ago that you supposed he was drinking, and then when I objected, you said he was drinking. Now, do you know that he was, or are you still supposing?

118 A. Well, I smelt it on his breath.

Q. Well, was he drunk?

A. He was not when I saw him.

Q. How?

A. He was not the first time I saw him.

Q. He was?

A. He was not.

Q. He was not?

A. No sir.

Q. Do you know Al Rader?

A. Who?

Q. Al Rader?

A. Yes sir.

Q. Was Al Rader there at the time?

A. No.

Q. Was he working there then?

A. If he was I do not know it. I did not know Al Rader until today.

Q. Were you summoned as a witness in this case?

A. Yes sir.

Q. How?
A. Yes sir.
Q. Where are you living now?
A. At Bulls Gap.
Q. At Bulls Gap. How long have you been working for the Southern?
A. Ever since February third, 1911.
Q. Have you ever been a witness for them before?
A. No sir.
Q. This is your first experience?
A. This is the first time I ever was in a court room.
Q. How many days did he work up there, Crockett?
A. I cannot tell you?
Q. How many days did he work after Mr. Pitts relieved him?
119 A. I don't know of him working any day.
Q. How?
A. I don't know of him working any day?
Q. Take this record and tell us how many days he worked after Mr. Pitts relieved him (handing witness bundle of time tickets)?
A. These are all Crockett's time tickets.
Q. How?
A. These are all Crockett's time tickets.
Q. Not all of them?
A. They only run from——
Q. Stand aside.
A. (No answer.)

Witness excused.

G. M. HURD, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business, Mr. Hurd?
A. I am yardmaster at Bulls Gap.
Q. For the Southern Railway Company?
A. Yes sir.
Q. Were you yardmaster up there for the Virginia & Southwestern in December, 1910 and January 1911?
A. Yes sir.
Q. That took place in February 1911, did it not?
A. In 1910 when I took charge of it, December 31, 1910.
120 Q. It was December 1910; the Southern took charge after that?
A. Yes sir.
Q. You were there first for the Virginia & Southwestern were you?
A. Yes sir.
Q. Do you know this man Crockett here, the plaintiff?
A. Yes sir.

Q. Did he work for you up there in the yards?
A. He was working there when I took charge of that yard; yes sir.
Q. What sort of work was he doing?
A. He was yard conductor at night.
Q. Was he over or under you; did he work under you while you were there?
A. He was under me; yes sir.
Q. You were the yardmaster?
A. Yes sir.
Q. What sort of work did he have to do; was it a man's work?
A. What is that?
Q. Did he have a man's work to do up there?
A. Yes sir.
Q. Was it a sick man or a well man's work?
A. Well, it was a well man's work.
Q. What sort of work did he do?
A. He was yard conductor.
Q. I know, but what does a yard conductor do, in the way of working?
121 A. Well, of course there ain't much work in it; he has to see that the brakemen do their work and keep the engine going and keep the trains made up.
Q. Did he have to move about over the yard any?
A. Well yes, of course he had to be around on the yard.
Q. He had cars to cut loose?
A. No sir, it was not necessary for him to cut any cars; he has got brakemen to do that.
Q. How long did Crockett work under you?
A. Well, I don't remember the date exactly; I think it was—I came there in December, the last day of December.
Q. Did he quit on his own accord, or was he discharged?
A. No sir, he did not quit on his own accord.
Q. Was he discharged?
A. Yes sir.
Q. What was he discharged for?
A. For being drunk on duty.
Q. How long have you known him?
A. I had not known him—I didn't know him until he came to Bulls Gap.
Q. Do you know what his general character is up there?
A. No sir.

Cross-examination by Mr. GRIMM:

Q. How long have you worked for the Southern Railway Company?
A. Well, since 1910; December 31, 1910.
Q. You are working for the Southern Railway Company now?
A. Yes sir.
122 Q. Were you present when Crockett was discharged?
A. Yes sir.

Q. You were?
A. Yes sir.
Q. What day was he discharged?
A. I don't remember the date; it was sometime in January.
Q. About what time in January?
A. I think it was along about the middle of January.
Q. About the 15th?
A. Somewhere along there; I would not say what day.
Q. Who discharged him?
A. What did you say?
Q. Who discharged him?
A. I did.
Q. Did you give him a discharge ticket?
A. Yes sir. Well, I told the trainmaster about it, Mr. Kent, and he told me to discharge him and give him his time.
Q. Did you do it?
A. Yes sir.
Q. Did you give him his time?
A. Yes sir.
Q. You did?
A. Yep.
Q. Have you got a record of it here?
A. No sir.
Q. Is it not a fact that he drew his check for the time he had in on the next regular payday?
A. I don't know whether he did or not. I never heard anything from him after that.
Q. Isn't it a fact you did not give him his time?
A. I told him I would not work him any more.
Q. Isn't it a fact that he worked up there until the South-
123 ern Railroad took the railroad over?
A. No sir, he did not.
Q. Except for his coming to Knoxville to get his wife?
A. The Southern did not take it over——
Q. Isn't it a fact that he got off from there on the 23rd day of January for the purpose of going to Knoxville to get his wife?
A. No sir.
Q. That is not true?
A. No sir.
Q. Didn't he ask your permission to get off and come down here and get his family?
A. No sir, he did not.
Q. All that is not so. Didn't you hold the road-man off to work in his place while he came down here?
A. No sir.
Q. Didn't you hold Walter Hill over for that purpose?
A. No sir. Walter Hill never worked on the Bulls Gap road as conductor.
Q. Did he work on the road?
A. He worked as brakeman; he never worked as conductor.
Q. Didn't he relieve Crockett when Crockett came to Knoxville?

A. No sir.
Q. Who did relieve him?
A. They cut the yard conductor off—cut him plumb off.
Q. How often have you been a witness for the Southern Railway Company?
A. This is the first time.
124 Q. This is your first time?
A. Yes sir.

Witness excused.

W. T. DAY, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business, Mr. Day?
A. Locomotive engineer.
Q. Locomotive engineer?
A. Yes sir.
Q. For the Southern Railway Company?
A. No sir, for the Virginia & Southwestern.
Q. For the Virginia & Southwestern. Were you working for the Virginia & Southwestern up at Bulls Gap in December 1910 and January, 1911?
A. Yes sir.
Q. Did you know Mr. Crockett up there at that time?
A. Yes sir.
Q. He worked up there as yard conductor or something?
A. Yard foreman, yes sir.
Q. Do you know what made him quit work up there?
A. He was discharged.
Q. For what?
A. For being intoxicated.
Q. On duty?
A. Yes sir.
125 Q. What do you know about his being intoxicated?
A. I was running the engine in the daytime, and I went down that morning and the engineer that was running the engine told me about it, and he said he was in the block office, and when I went over there I saw him lying under the table in the telegraph office the next morning asleep.
Q. This man Crockett?
A. Yes sir.
Q. Was that when he should have been at work?
A. Yes sir, the yardmaster had come down and got out of his bed to relieve him.
Q. How long have you known Crockett?
A. I just knew him there at Bulls Gap.
Q. Do you know what his character is up there?
A. No sir, I never did—I don't know anything about his character at all, because I did not see much of him, only at night when I was at work.

Cross-examination by Mr. GRIMM:

Q. Do you know that he was drunk?
A. Sir?
Q. Do you know that he was drunk?
A. No, I was told he was drinking.
Q. You are not testifying from personal knowledge?
A. No sir, not that he was drunk; I know he was lying under the table in the telegraph office asleep.
Q. You knew that he was suffering didn't you; you knew he was afflicted, that he was suffering, didn't you?
A. No sir.
Q. How long have you worked for the Southern Railway Company?
126 A. I worked for the Southern Railway Company about two years before I went to work for the Virginia & Southwestern.
Q. When did the Southern take charge of the Virginia & Southwestern up there at Bulls Gap?
A. Sometime in February, I think.
Q. What time in February?
A. Somewhere in the first part of February.
Q. About the third?
A. Somewhere right close to that.
Q. What date was it that you saw Crockett lying down there in the house asleep at night?
A. I don't remember the date at all.
Q. How long was that before he quit working there?
A. He did not work any more after that.
Q. He did not?
A. No sir.
Q. What date was it?
A. I do not know the date.
Q. What month was it?
A. As well as I remember it was in January; it has been so long since——
Q. About what time in January?
A. Why, it was about the middle, the first or the middle; somewhere along there, about the middle.
Q. Who succeeded him as yard conductor?
A. I think it was a fellow by the name of Pitts; I am not certain, but I was on the road——
Q. Didn't Crockett work there in the daytime after Pitts came there?
127 A. If he did I did not know it.
Q. Pick up this record and see if it isn't a fact that he worked there after that?
A. He might have worked there. I don't know. I am not positive.
Q. Isn't it a fact that the night yard foreman's office was discontinued and that there was no night foreman after that?
A. I don't remember anything about that.

Q. You don't know anything about that?
A. No sir.

Redirect examination by Mr. SMITH:

Q. You work for the Virginia & Southwestern now, do you?
A. Yes sir.
Q. The Southern simply took over the operation of the yards there at Bulls Gap?
A. At Bulls Gap, yes sir.
Q. The Virginia & Southwestern is still operating there?
A. It is still operating there; yes sir.
Q. It comes into Bulls Gap?
A. It comes into Bulls Gap and is under the Southern's jurisdiction when they get in the yards.
Q. When they get in the yards they are in Southern Territory?
A. Yes sir. This man might have worked there afterwards, but I never saw him there any more.
Q. He was working for the Virginia & Southwestern when they operated the yards up there?
A. Yes sir.

128 R. E. HURD, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business?
A. Assistant yardmaster for the Southern Railway Company.
Q. Assistant yardmaster for the Southern; were you working for the Southern Railway Company in October, 1910 when Mr. Crockett here claims to have been hurt?
A. Yes sir.
Q. What was your position with the company then?
A. Assistant yardmaster.
Q. Where were you working?
A. At Coster.
Q. Where he got hurt?
A. Yes sir.
Q. Are you familiar with those tracks up there?
A. Yes sir.
Q. I wish you would take this piece of chalk and draw here a little illustration on the floor, of those yards, beginning with the lead up here about the jurors' feet, and show how those tracks branch off from it. Make a double track with two rails if you can and run it from the upper end towards the lower end?
A. (Witness complying with request.) That is the dividing switch between 9 and 10. Here is 9 and there is 10.

129 Q. This is 9 off this way?
A. Yes sir. 10 leads onto the lead.

Q. This is 10 here?
A. Uh-huh.
Q. Here is where they come together?
A. That is where 9 and 10 join.

Q. The next one up here is 8, and 7 and so on back to 1 (indicating)?

A. Here is 1 and the track comes in there on a new track; it is an old caboose track and the old house-main follows back of it.

Q. Is there a scale house up this track somewhere?

A. Yes sir.

Q. About where is it; which one of these tracks is it opposite?

A. It sets right about opposite number 5.

Q. Along about here?

A. Yes sir.

Q. How long had you been at work out there in this yard?

A. In Coster?

Q. Yes, before that time?

A. I went there about—to the best of my knowledge in July, 1907.

Q. Were you frequently over this track down along through here too from number 9 and 10 and this lead along here?

A. Yes sir.

Q. What was the position of the tracks there in the yard
130 at this point here near the junction of these two and on down 9 and 10?

A. The leads were in good shape; very good shape.

Q. How was this track along here?

A. All right.

Q. Was there a marshy place anywhere right along in here?

A. Why about—well say 20 car lengths down on 8 there was a marshy place where they had a pipe line running through.

Q. How long was that track number 9 from the switch out that way (indicating)?

A. Number 9 would hold anywhere from 35 to 38 cars.

Q. How far was that marshy place down this way?

A. Well, it was just about opposite the Coster yards office, the pipe line running directly from the Coster yards office across to the shop, out there about 18 or 20 car lengths.

Q. 18 or 20 car lengths from this switch down here?

A. Yes sir.

Q. Was there any marshy place or wet place on number 9 down where this accident is supposed to have occurred?

A. No sir, nothing near the upper end whatever.

Q. Now where were you—had you seen Crockett before he was supposed to have gotten hurt?

A. Yes sir.

Q. Where did you see him last?

A. It was up about 5 or 6 switch—him and a conductor. I guess there were one or two more men there.

Q. Where were you?

A. I was over at the scale house; I was sitting on the box
131 at the scale house.

Q. Along up here?

A. Yes sir; there was a box by the side of the scale house, and I was sitting there.

Q. Did you see those cars break loose?
A. Yes sir.
Q. And you were up here at the time they broke loose?
A. Yes sir.
Q. Where was the engine when the cars broke loose from it?
A. To the best of my knowledge the engine stood just about between 8 and 9 switch before you turn into 9.
Q. Was the engine still on the lead at that time?
A. Yes sir, on the lead, the cars were heading down the lead, and they were shoving down because 9 hung up pretty far.
Q. Do you mean it was full of cars?
A. Full of cars and by that; they would have had to have shoved in 9 before they got clear of number 10, and they were shoving down; 9 was practically full.
Q. At this time number 9 was practically full of cars?
A. Yes sir; yes sir.
Q. They were standing all along here?
A. I will say there were anywhere from 8 to 10 car lengths on 9, from here down (indicating).
Q. From here down to the first car?
A. Yes sir.
132 Q. As that engine pushed down there, why was it following those cars down there?
A. There was a plug right there; they were building a train and the track was practically full, and they always follow them down and plug them to clear the next track, so they would clear number 10.
Q. At the time these cars broke loose, how were they moved, fast or slow?
A. Just at a slow rate, just drifting along there. I practically paid no attention to the cars because it was a slow rate of speed that they were moving, and I knew there could be no *damage* of hitting.
Q. Was there any damage done if it hit?
A. No sir.
Q. What sort of a lick did they hit?
A. It was what I would call a rough coupling.
Q. About how far did the front car have to run after the engine cut loose from the cut of cars before it struck the cars?
A. I could not say positively, but to the best of my knowledge it would be about four car lengths.
Q. About four car lengths?
A. Yes sir.
Q. Did you see Crockett at the time the cars were cut loose?
A. No sir, I never noticed him at the time the cars were cut loose.
Q. Where did you say you saw him just before they were cut loose?
133 A. He was walking along, just about 9 switch.
Q. He and who?
A. Dowling.
Q. That was the conductor?
A. Yes sir.

Q. They were walking down this way?

A. Yes sir. I disremember whether it was 9 switch; it was along about 9 switch; I noticed them there.

Q. Was that about the time the cars came down there?

A. Yes sir, that was when they were shoving down.

Q. Were you Crockett's foreman? Did he report to you—work under you?

A. He worked under Dowling as foreman; I was yardmaster in charge of the yard.

Q. Did you see him after this?

A. Yes sir.

Q. Do you know whether he had been complaining of being sick before this?

A. No sir, I do not. He said he was sick that morning and he wanted to go home.

Q. Was that before or after these cars cut loose that he told you?

A. It was after that.

Q. How long after?

A. Well I don't know; I guess it must have been about thirty minutes; I don't remember the exact time.

Q. Did he say anything to you about having gotten hurt?

A. No sir.

Q. What did he say?

134 A. He said he was sick and wanted to lay off.

Q. He said he was sick?

A. Yes sir.

Q. Did he say anything about what was the matter with him?

A. No sir.

Q. Did he say anything to you after that about what he was suffering with?

A. He said he had a little gonorrhea trouble before that.

Q. When was that?

A. That was some previous to that; I don't just remember the time.

Q. He complained of having a dose?

A. Yes sir.

Q. You say he did not say anything to you about having gotten hurt when he came up there?

A. No sir, not about getting hurt, because if he had I would have made an accident report about him being hurt, which is required every time a man is hurt in an accident. In fact I never paid any attention to it really at all; he never mentioned it until the next day or so. It was Tuesday before I heard it from him.

Q. This engine 649, are you familiar with that engine?

A. Yes sir, it was the regular engine on that side and worked the empty side lead all the time.

Q. Do you know whether there was anything the matter with its drawbar, whether it was too low or too high or whether

135 it was standard or what?

A. No sir, it was the same drawbar we worked with all the time.

Q. Have you been using that engine ever since, out there, or did you use it for any length of time afterwards?

A. Yes sir, we used it for a long time after that.

Q. Did it have any changes made on it?

A. Not to my knowledge, no sir.

Q. Was there any trouble with it about it breaking loose?

A. No sir, the cars will frequently break loose from an engine and cars will break loose from cars, but nothing more than the ordinary which occurs in every day work, in railroading—switching, especially.

Q. It is a thing that occurs in switching, ordinarily?

A. Yes sir, ordinarily; they will break in two and for what reasons you cannot tell sometimes.

Q. How long have you known Crockett?

A. Why, I just don't remember how many years; since I have been at Coster; since 1910, anyway.

Q. Are you acquainted with his character?

A. No, not personally you might say.

Q. I mean, do you know what his reputation is, what people say about him?

A. Yes, I know what people say is all.

Q. Is that good or bad?

A. Well, I could not say it was good.

Q. From the character that he has, that you know of, is he entitled to full faith and credit as a witness?

136 A. Well, I don't know.

Cross-examination by Mr. GRIMM:

Q. You are working for the Southern Railway Company now?

A. Yes sir.

Q. What position do you hold?

A. Yardmaster, night yardmaster now.

Q. What were Crockett's duties on that train that was being pushed down track number 9 that day?

A. His duties?

Q. Yes?

A. Well, in handling a cut of cars, it is the duty of the man to be riding the head car shoving down.

Q. It was his duty to be on the car?

A. His or whatever fellow—there were about seven men working on the crew—any one of the seven is all right.

Q. Do you know whether he was on the car or not?

A. He was not on the car when they were shoving them down because him or Dowling was either walking or standing, I don't remember.

Q. Do you remember whether or not he boarded the car?

A. No sir, I do not; I did not see him get on it.

Q. The engine did break loose from the cars?

A. They broke loose.

Q. And they bumped?

A. They bumped, yes sir.

Q. How far were you away when they bumped?
A. When they bumped I was about—I just don't know how many feet, about forty or fifty feet; I was the distance from the
137 scale house where 9 and 10 divides.
Q. How many feet do you think you were away?
A. Well, I just don't know the exact number of feet.
Q. Were you north, east, south or west from the cars?
A. North above the cars.
Q. Do you know which way the wind was blowing that day?
A. No sir, I don't recall.
Q. Crockett did within thirty minutes after this collision occurred, ask you to get off; he said he was sick, did he?
A. Why, I don't remember whether it was thirty minutes or not.
Q. Well, a short time after?
A. It was after that, yes sir.
Q. And you left him off?
A. Yes sir.
Q. And he left?
A. Yes sir.
Q. You know that the company sent him to the hospital?
A. No sir, I do not.
Q. You know that he was there for 18 days?
A. No sir, I do not.
Q. You know that the company's doctors waited on him?
A. I was not certain of that.
Q. You don't swear they did not, do you?
A. No sir, nor I could not swear they did either.
Q. Didn't he tell you when he came up there that he got hurt and could not make it; didn't he come up to the scale house?
138 A. After he was hurt?
Q. Yes sir?
A. No sir, he told me he was sick.
Q. Didn't he tell you he could not make it?
A. He told me he was sick; I don't remember whether he told me he could not make it; he said he was sick and wanted to lay off.
Q. Didn't you tell him to go down to the shanty and lay down awhile and maybe he would feel better?
A. No sir.
Q. You did not tell him that?
A. No sir.
Q. Didn't you ask him if he wanted you to bring him to town on a switch engine?
A. No sir.
Q. You did not do that?
A. No sir.
Q. Didn't you tell him to report to Newman's office, the company's doctor?
A. No sir.
Q. And that you would call him too?
A. No sir, and I did not call him either; I always call the doctor.
Q. Did you tell him you would call him?

A. No sir.

Q. You might be mistaken as to some of the conversations, might you not?

A. I am very apt to be, yes; I don't remember all the
139 small occurrences that happen, but I know I did not call Dr. Newman.

Q. It has been too long ago for you to try to remember all of it?

A. All of it, but I remember a very good portion of it.

Q. How high are the drawbars, what I mean is the gripping part of the drawbars, where the cars are hitched together, the knuckles?

A. Different knuckles have different widths. A Major knuckle is wider than a Jenny, it is wider than a——

Q. How wide is a Jenny?

A. Seven and one-half (inches), and a Major is eight and one-half; a Gould is smaller than a Tower.

Q. It was a frequent thing for trains to break in two in the yard?

A. Not frequently.

Q. It happened every day?

A. It happened; some days it happened and some days it would not.

Q. It would happen on an average every day, would it not?

A. Well, I could not say that it happened on an average of every day.

Q. Would you say it happened four or five times a day?

A. Sometimes it happened once or twice a day and sometimes it would not happen at all.

Q. Isn't it a fact sometimes you would have to make a coupling four or five times, that it would come out?

A. No sir. Sometimes you will miss a coupling four or
140 five times, but if you ever match them up right, they will never tear loose unless there is something wrong with them.

Q. Was track number 9 straight?

A. Yes sir, after it got off of the curve of the lead; of course there is a light curve after you turn from the switch down in 9, there is a slight curve, but after that it is practically a straight track.

Q. You don't know what reports have made on that engine?

A. Up to date?

Q. No, within fifteen days after that collision?

A. There was none made in the drawhead, I know.

Q. How do you know?

A. Well, because if any repairs had been made in the drawhead, I would have been the man that sent the engine down there.

Q. What reports were made on engine 621; when was the last time they were made?

A. I do not recall.

Q. When were the last reports made on 649?

A. I don't recall that.

Q. When was the last report prior to that collision?

A. I do not recall. I could not remember the dates; I did not try to remember the dates.

Witness excused.

141 L. W. SHULTZ, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. You are locomotive engineer for the Southern Railway Company?
A. Yes sir.
Q. And were you operating engine 649 in October, 1910?
A. Yes sir.
Q. You were on duty in operating that engine at the time Mr. Crockett here claims to have got hurt?
A. At the time he claims to have got hurt; I did not know anything about it for two or three days afterwards.
Q. Didn't you hear about his getting hurt right there at the time the cars broke loose?
A. No sir, not that day; two or three days afterwards.
Q. You were the one that was in charge of that engine 649; is that the number?
A. 649.
Q. What sort of an engine was that, a switch engine?
A. Yes sir, a regular switch engine.
Q. What was the height of that drawbar from the top of the track?
A. The height is from 31½ to 34 inches.
Q. Is that the standard height for switch engine drawbars?
A. Anywhere from 31½ to 34½.
Q. What was the height of yours; was it within that height?
142 A. Yes sir.
Q. Was it below the standard or above the standard?
A. No sir, it was between. I don't know exactly the height, but it was in between 31½ and 34½; I had had the engine righted up a few days before.
Q. Just a few days before the drawbar had been raised, had it?
A. Yes sir.
Q. How long before?
A. Two or three days; I don't know exactly the time; I don't re-
Q. You had had the drawbars repaired and raised up?
Q. You had the drawbars repaired and raised up?
A. Yes sir.
Q. And on this occasion it was in good order, was it?
A. Yes sir.
Q. Where was your engine at the time the cars broke loose from it?
A. Well, part of the engine was on the lead and I believe very near all of it.
Q. Let this represent the upper end of the yard up towards Sharp's Gap, this line running down here, represents the lead?
A. Yes sir.
Q. Where is track number 9 switching off from that lead; right here at this switch?
A. Yes sir.

Q. How far up this lead has you pushed that cut of cars?
143 A. We came all the way down the lead; I don't remember how far down.
Q. How many cars did you have in that cut, Mr. Shultz?
A. I don't know that either.
Q. At any rate you were pushing them down the lead and down onto this track?
A. Yes sir.
Q. And when your engine got about the switch of number 9 the cars broke loose?
A. Yes sir.
Q. Where was your engine; was your engine on the lead track?
A. Yes sir, part of the engine was on the lead; just about the front of the engine maybe had got down to the switch or a little over the switch of number 9 when the cars broke loose.
Q. How far did the cars have to run until they got to the other cars?
A. Two or three car lengths.
Q. How were you operating the cars at that time, fast or slow.
A. Very slow.
Q. Was any damage done there?
A. None that I know of.
Q. To the cars?
A. Not that I know of.
Q. What was the condition of the track along about where those cars were cut loose?
A. Why, I think it was a good track.
144 Q. Did you operate over those tracks frequently?
A. Yes sir, every day.
Q. Did you use this engine after that?
A. Yes sir.
Q. How long afterwards?
A. Why, I used it a long while, for a year.
Q. Did you have anything done to the drawbar after that while you operated it?
A. No sir.
Q. Did you have any more trouble with it?
A. No sir.
Q. I will get you to state whether or not occasionally in switching operations there in the yards, cars come loose from one another and come uncoupled?
A. Yes sir, they do.
Q. Are you always able to tell what makes them do it; can you explain why it was?
A. Sometimes you can and sometimes you cannot.
Q. Do you know what caused them to come apart on this occasion?
A. No sir, I do not know what caused it.
Q. How long have you known Crockett?
A. I have known him five or six years, maybe longer; I don't know exactly.

Q. Are you acquainted with his general character and reputation, Mr. Shultz?

A. I don't know anything about that only his work up there on the hill where we worked.

145 Q. Well, what about his character, the estimate in which he was held by the men whom he associates with?

A. I cannot tell you.

Q. Do you know what his reputation among the men is for truth and veracity?

A. No sir.

Cross-examination by Mr. GRIMM:

Q. Mr. Shultz, the cars did break loose from your engine?

A. Yes sir, they came loose from the engine.

Q. They ran down and ran into some other cars?

A. I suppose they did; they said they did; I don't know whether they did or not.

Q. Where was Crockett when that happened?

A. I don't know where he was.

Q. Where was his place; where was it his duty to have been?

A. I cannot tell you his place; his place was on the cars and on the ground too, as far as that is concerned.

Q. Do you remember Crockett coming up and telling you he was not able to work right after that happened?

A. No sir.

Q. Huh?

A. No sir.

Q. Do you remember having any conversation with him at all?

A. I said a few words to him in the morning.

Q. What time in the morning?

A. He came up to the engine and he looked pretty tough to me, and said I have got a hell of a dose—that way; I don't know

146 what he meant by that, though, and I think that is the only thing I spoke to him that day.

Q. What time of day was that?

A. That was in the morning.

Q. What time in the morning?

A. I don't know, maybe seven o'clock; it might have been later than seven.

Q. It might have been nine?

A. I don't know; I don't think it was that late.

Q. It might have been ten?

A. I think it was about seven o'clock I was talking to him.

Q. Tell us what time it was?

A. I will say seven, if you want me to.

Q. Are you sure it was seven?

A. No sir.

Q. Why do you say seven, because you think I want you to?

A. I say it was about seven; I cannot tell you positively what time it was.

Q. Didn't you tell Crockett not four days ago that you remembered him coming up there and telling you that he was not able to work?
A. No sir, I don't think I did.
Q. Huh?
A. No sir.
Q. Do you remember having any conversation with him within the past four days?

A. I talked with Davy Friday; he came by, and all the
147 talk I had with him was just what I told you a few minutes ago.

Q. You told him that you remembered that the cars broke loose, didn't you?
A. Yes sir, I knew the cars broke loose from the engine.
Q. And didn't you tell him that you remembered him coming up there and saying he was not able to work?
A. He did not tell me that.
Q. Didn't you tell him that on Friday of last week that you remembered that?
A. Tell him what?
Q. Didn't you tell him that on Friday of last week?
A. No, I did not tell him.
Q. You did not. What sort of a signal did Dowling give you after the cars broke loose?
A. To back me out—the back-up signal.
Q. Whereabouts was Dowling at that time?
A. As well as I remember he was three or four car lengths below me.
Q. Below you?
A. Yes sir.
Q. Behind you?
A. Sir?
Q. Behind you?
A. No, ahead of the engine.
Q. That was towards the hind end of the train though?
A. No, the head end.

Q. What were you doing that morning with that train?
148 A. We were shoving some cars in on number 9.
Q. What were you coupling them up for?

A. To put them in a train—building a train.
Q. You were making a train for Bristol, Virginia?
A. Yes sir, I suppose it was the Bristol train; they were putting them on the Bristol track all right; it was used for that.
Q. How far down number 9 was Dowling when he gave you the back-up signal?
A. Not over three or four cars I wouldn't think; I don't remember exactly how far.
Q. How far were you down track number 9?
A. I was not down 9 hardly at all; the engine was headed in on 9 switch, and I was still on the lead.
Q. You say it was of frequent occurrence that cars broke loose in the yards?

A. Yes sir, they would break loose pretty often.
Q. Huh?
A. Yes sir, it was very near an every day occurrence.
Q. It was very near an every day occurrence; how high are those drawbars, the knuckles?
A. I don't know the exact height but it was between 31½ and 34½; it was inside of the limits all right.
Q. How do you know it was if you don't know how high it was?
A. It did not come uncoupled any more after that at all.
Q. How do you know that they were within 31½ and 34½ if you don't know how high they were?
A. They would not stay coupled, if they were not.
149 Q. How high are those knuckles?
A. They are different.
Q. What is the smallest knuckle that you use?
A. I think it is the Shult knuckle, is the smallest.
Q. They fasten together this way, don't they (indicating)?
A. Yes sir.
Q. And if they fit they grip each other for seven inches?
A. They grip for seven, and they may not for so much. You will hardly get them to grip for the full width of the coupling.
Q. Explain to the jury how they would come unfastened if they gripped more than seven inches—if they gripped each other seven inches?
A. There are several things to make them uncouple; sometimes a knuckle will open when an accident occurs; I never looked at the coupling at all.
Q. But you testified a moment ago they were between 34½ and 31½ because they did not come uncoupled, and if they gripped each other for seven inches, then one could be six inches lower than the other without them coming uncoupled?
A. It might be.
Q. There would still be——
A. An inch would hold, maybe, and maybe it would slip by. It depends on how badly it would be worn.
Q. As a matter of fact you don't know how high those couplings were?
A. I know my engine was in the limits; if they were not
150 it would have come uncoupled all day long; it would not have stood all day long.
Q. That is what makes them come uncoupled?
A. That is one reason.
Q. That is the main cause?
A. I don't know whether it is or not.
Q. Another cause is low joints?
A. I suppose a low joint maybe would make them come uncoupled.
Q. If you run over low joints, when the front end of the engine strikes a low joint the hind end flies up and the front end goes down?
A. Yes sir.

Q. On what day did you have that drawhead repaired?
A. I don't remember the date exactly.
Q. What month was it in?
A. I don't know, sir; I never thought anything about it.
Q. What year was it in?
A. It was in 1910, I believe it was.
Q. What time of the year?
A. It was along in this month, about the first of the month or something like that.
Q. About the first of the month?
A. Yes sir, maybe later on; I don't remember the date.
Q. You don't remember when it was?
A. No sir. If anything gets wrong we repair it always.

151 Redirect examination by Mr. SMITH:

Q. Shortly before that you had raised the engine?
A. Shortly before that we had raised the engine up and worked on it.

Recross-examination by Mr. GRIMM:

Q. But you don't remember the date?
A. The date? No sir.
Q. You don't remember the date that Crockett got hurt?
A. I remember the day they said he got hurt.
Q. Do you deny that he got hurt?
A. It was the 15th of this month the day he said he got hurt.
Q. Do you want the jury to believe that Crockett did not get hurt?
A. I don't know anything about that. I do not. Of course, I suppose he does.
Q. You are working for the company now?
A. Yes sir.

Redirect examination by Mr. SMITH:

Q. You never heard anything about his getting hurt at the time?
A. No sir, I did not hear anything about it.
Q. Was it before these cars came uncoupled that day that you had the conversation in which he said he got a hell of a dose; it was on that same day?
A. It was on the same day that he named that conversation to me.
Q. Was that before or after the cars cut loose?
A. It was before.
152 Q. In the morning?
A. Early in the morning; we had not been to work very long.

Witness excused.

J. H. DOWLING, the next witness called on behalf of the defendant, having be-n first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business, Mr. Dowling?
A. Yard conductor.
Q. For the Southern Railway Company?
A. Yes sir.
Q. You are working out here in the Coster yards?
A. Yes sir.
Q. Were you working out there on the 15th of October, 1910?
A. Yes sir.
Q. Do you remember the occasion on which this man Crockett here claims to have gotten hurt?
A. Yes sir, I remember something about it.
Q. Where were you at that time?
A. At the time he got hurt?
Q. At the time he claims to have gotten hurt, yes sir?
A. I was walking down by the side of a cut of cars.
Q. The same cut of cars that broke loose?
A. Yes sir.
Q. Were you the yard conductor out there at that time?
153 A. Yes sir.
Q. And this man Patterson or Crockett worked under you, did he?
A. Yes sir.
Q. We will let this line here represent the lead coming up from Sharp's Gap down this way; here is where track number 9—here is the scale house and this is where 9 and 10 come together. Did you see this cut of cars coming down the lead here towards number 9?
A. Did I see them?
Q. Yes?
A. I was walking along by the side of them, shoving them down with the engine.
Q. The engine was shoving them down and you were walking, you were directing the movement, you were the conductor in charge of it?
A. Yes sir.
Q. Where were you and Crockett?
A. Well, I don't just remember whereabouts along the cut of cars we were at.
Q. Where were you with reference to the switch here, say at number 9 and 10, were you above that or below that?
A. He was below that when the cars broke off.
Q. I mean were you and he, which direction were you and he walking along; you say you were walking along there?
A. Yes sir, we were walking along the same way the cut of cars was going.
Q. Where was the engine when the cars cut loose?

A. The best I can recollect we turned in number 9 and
154 just turned in off the lead.

Q. Do you mean the cut of cars turned in or the engine?

A. No, the engine.

Q. The cars then were down on this track mostly?

A. Yes sir, they were already headed in 9.

Q. Where was Crockett?

A. At that time he was walking down between 9 and 10.

Q. Down here between 9 and 10?

A. Yes sir.

Q. Did you see him get on the cars?

A. No sir.

Q. Where were you when they broke loose?

A. The best I can recollect I was two or three cars from the engine.

Q. Up——

A. No, back down.

Q. Back down this way?

A. Yes sir, the same way the cars were moving.

Q. How far did the cars have to run after they broke loose until they hit the other cars?

A. Well, from where I was standing it looked like they had about two or three car lengths to roll.

Q. Were they moving slowly or fast?

A. Slowly, just about as fast as a man could walk.

Q. With what sort of force did they come against the other cars?

A. About the usual coupling.

Q. About the usual coupling?

A. I have made couplings harder than they hit lots of
155 times.

Q. Did it do any damage to the cars?

A. No sir.

Q. Did you hear anything about this man getting hurt there at the time?

A. No sir.

Q. Did you see him afterwards?

A. I don't recollect whether I did or not; he got off from the yardmaster afterwards, and I don't recollect whether I saw him or not.

Q. Did you notice him on the cars anywhere?

A. No sir, I didn't notice him on the cars anywhere.

Q. Do you know whether he got on the cars?

A. No sir.

Q. Where did he tell you about it?

A. He told me he caught the cars and he went up, was going up between the cars on the end ladder when they struck and knocked him back against the tunnel brake.

Q. When was that; was that at the time it happened, just after it happened or was it some time afterwards?

A. Some time afterwards I think is the way he told me.

Q. After he came out of the hospital?

A. I don't remember just exactly when it was.
Q. Did you have any conversation with him there on the ground at the time?
A. Only, I was telling him if they were to break off he ought to be on the top.
Q. That was while you were walking on?
A. That was while I was walking on.
156 Q. You told him he ought to be on top of the car so if they broke loose he could control them?
A. Yes sir, and he started on down to get on.
Q. What was the condition of the engine's drawbar as to whether it was too high or too low or how?
A. I cannot tell you that.
Q. You were not an engineman?
A. No sir.
Q. Did you notice anything wrong with it being too low?
A. No sir.
Q. How was the track along there about the junction of number 9 with the lead?
A. Fairly good.
Q. Do you know anything about whether Crockett had been unwell prior to this time?
A. He complained of being sick.
Q. What did he say was the matter with him?
A. He never told me.
Q. He never told you?
A. Not as I recollect, no.
Q. When was it he was complaining of being sick, before this happened?
A. Yes sir.
Q. Did you hear anything about his being sick that day?
A. Yes sir, he told me he was sick that morning, wanted to get off.
Q. Was that before this happened?
157 A. Yes sir.
Q. He was sick and wanted to get off. How long had you known Crockett?
A. Well, I have known him for the last five or six years, I guess.
Q. Are you acquainted with his general character?
A. No sir I am not acquainted with it. He worked for me a whole lot, but so far as his character, I don't know a thing about it.
Q. Do you know what his reputation is?
A. Only what the rumors are.
Q. What is his reputation; are you acquainted with the rumor, what people say about him, the estimate in which he is held by the men he works with and associates with?
A. No sir, I am not much acquainted with him.
Q. You know what the people say and think of him don't you; or do you?
A. Well, some don't think very much of it and some thinks a right smart of him.

Q. Do you think you know what the estimate is in which he is held by the people who associate with him and work with him?
A. (Witness shakes his head.)

Cross-examination by Mr. GRIMM:

Q. You have known Mr. Crockett how many years?
A. I expect five or six years; maybe longer.
Q. You are still working for the Southern Railway Company?
A. Yes sir.
158 Q. You are holding what position now?
A. Yard conductor.
Q. Crockett did not get off that morning until after those cars struck, did he?
A. Did not get off?
Q. Did not get off from work?
A. No sir, he did not get off I don't think until after the cars struck.
Q. He did not get off until after those cars struck, not until after that engine came loose from that train and not until after you heard that bump down there, did he?
A. No sir, he never got off until after that happened.
Q. And after that he did not do any more work?
A. I could not tell you about that.
Q. You don't know of any that he did?
A. He never worked none for me.
Q. He was in your crew, was he not?
A. Yes sir.
Q. You were his boss?
A. Yes sir.
Q. And he worked none after that?
A. Not that I know of, I don't think.
Q. But he did work up to that time; where did you say the engine was after it cut loose from the cars?
A. The best I can recollect he turned in off the lead.
Q. The cars then—the engine was pushing the cars?
A. Yes sir.
Q. And how many cars were there?
159 A. Well, I don't recollect; it must have been eight or nine, something like that.
Q. And you were away from the engine about the third car, if I understood you?
A. The best I can recollect, it was.
Q. Was it not Crockett's duty to be out there at the end-car, somewhere?
A. His duty?
Q. His duty?
A. His duty was to be on the cars and where he could see and take care of them. I don't know that it was his duty to be on the head car, or not.
Q. Who was on the head car?
A. Nobody that I know of.

Q. Did you call Crockett's attention to a negro being on the train?
A. No sir.
Q. Mr. Dowling, had that engine *being* giving you trouble?
A. No sir, it never gave me no trouble.
Q. Had it given anybody any trouble?
A. Not that I know of.
Q. How?
A. Not that I know of.
Q. Was it a frequent occurrence that it came loose from the cars?
A. No, no more than any engine will do sometimes.
Q. Was it not a frequent occurrence for engines in that yard about that time to come loose and cars to become uncoupled?
160 A. Not much worse than they are now.
Q. It was some worse?
A. I don't know that it was.
Q. Was there not constant complaint about it among the men?
A. I never heard no complaint, I don't think I ever did.
Q. Was it not a daily occurrence for them to come loose and throw cars off of the track?
A. Well, that is liable to happen any time, get cars off the track.
Q. Was not that a daily occurrence?
A. Not that I know of.
Q. How high are the knuckles on those cars?
A. I never measured one.
Q. You have been railroading how long?
A. About ten years.
Q. Give the court and jury the benefit of your best judgment on the subject.
A. I never had no idea, I couldn't give them no idea; it is out of my line of business.
Q. The height of the knuckles?
A. Yes sir.
Q. Mr. Dowling, you do know that Crockett was sent to the hospital, don't you?
A. The only thing I know is they say he was.
Q. Huh?
A. They say he was sent to the hospital.

Mr. SMITH: That would not be competent; he proved
161 that himself.
The COURT: It would not be competent.

Q. What sort of a signal did you give when the cars broke loose?
A. I think I backed him up, and went on about my business.
Q. What do you mean by backing him on up?
A. I backed him on up the track.
Q. What is the grade of that track?
A. Well, I cannot give you the grade on it for I do not know.
Q. There is a grade, isn't there?
A. Yes sir, it is a grade all right.
Q. Is it a heavy or a light grade?
A. Well, it ain't so heavy. It is medium.

Q. Do you keep what are known as herders to set brakes on the cars to keep them from running off of their own motion even after they are taken in there and switched there?
A. There has got to be brakes set on them, yes.
Q. That is because of the grade?
A. Why, certainly.

Redirect examination by Mr. SMITH:

Q. He has asked you about a negro; was there a negro switchman out there at all?
A. I don't recollect; we have negro switchmen.
Q. Did you have any there in your crew?
A. I don't remember if I did. I may have had some.

Witness excused.

162 J. F. WRIGHT, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. You are in the employment of the Southern Railway Company?
A. Yes sir.
Q. In what capacity, Mr. Wright?
A. Switchman.
Q. How long have you been in that capacity of work?
A. About five years the last time.
Q. Do you know this man Crockett?
A. David Crockett? Yes sir.
Q. How long have you known him?
A. About five years.
Q. Did you know him while he was working for the Railway Company out in Coster yards along in October 1910, and along there?
A. Yes sir.
Q. Were you working out there with him?
A. I was working on the same crew and engine with him at that day and date.
Q. You were acquainted with his engine 649, I take it?
A. Yes sir, the engine I was working with.
Q. Was there anything wrong with the drawbar of that engine, that you know of?
A. Not to my knowing.

163 Q. What is the standard height, did it appear to be too high or too low?
A. I assume that it was the standard height as it performed its duties.

Q. Do you know where track number 9 comes into the lead out there where there were some cars got loose?
A. Yes sir.
Q. Were you there when the cars got loose?
A. I was about number 7 switch.
Q. Did you see them break loose?

A. No sir, I did not see them break loose.
Q. You did not see Crockett at the time?
A. No sir.
Q. What is the condition of that track along there, Mr. Wright, about the junction of that switch along number 9 and the lead?
A. Why, in fair condition, serviceable condition.
Q. What was the state of Crockett's health along about that time?
A. Why, I never diagnosed his case; I could not say.
Q. Did he tell you anything about being sick?
A. Yes sir, he told me of being sick.
Q. Did you see him after these cars broke loose, have any conversations with him after that?
A. No sir, I did not; I did not see him.
Q. You did not have any opportunity at all to tell that day whether he got hurt or what, after the cars broke loose?
A. No sir, I did not.
Q. What was it he told you about being in bad health?
164 A. He told me a few days before this date of the 15th of October, that he had returned from Johnson City, and he said that he had had some days of rest, and recreation up there, and he had some sexual intercourse with some lady at Johnson City, I believe, and one in Bristol, and on the return trip back about the time he went to work, he had been at work and he says to me, do you know a case of clapp when you see it, and I said, no sir, I do not.
Q. You denied that?
A. I said I did not know it. He says, I believe I have got it. Well, I says I would advise you to go to some practicing physician, and it went on for four or five days and he says I have got some medicine that I think has fixed it up all right, and about the next time I saw him about this, he remarked to me, he says, the medicine that I got did not do me any good; he says I went down here on the corner of Jackson Avenue and Central Avenue at a man's drug store by the name of Stevens, old Dr. Stevens, and he gave me a prescription for a dollar which will knock this case out all right, and he says, all I have got to do is to take and get that and get that syringe full and put it into the canal of my penis and squirt it in there and then hold it by the head and let it run back into the bladder, and, he says, that will cure it.
165 Q. Are you acquainted with his general reputation and character?
A. Just in working—surfacing.
Q. Is his character and reputation among the men that he works with and associates with, good or bad?
A. Well, from the general reputation and character of the man, generally speaking, and what we hear from the men, it is not very good, as part of the men state it.
Q. On that character is he entitled to full faith and credit on his oath?
A. Well, on anything that would involve his own interest or the interest of others, I would hardly know. I could not say for myself.

He has always been truthful with me. I have always taken his statements with me to be the truth. I could not say otherwise.

Q. What is his general reputation and character among the people that known him and associate with him, what do they say about him and believe about him together with what you may know yourself, taking it all together?

A. It would be bad.

Cross-examination by Mr. GRIMM:

Q. You are working for the Southern Railway Company?

A. How is the question?

Q. You are working for the Southern Railway?

A. Yes sir.

Q. How long have you been working for it?

A. I commenced in the year 1885.

Q. How many times have you been a witness for the Southern Railway Company?

166 A. I think this is the second case.

Q. What was the other case?

A. For the East Tennessee Virginia & Georgia under Major Huger, a black man that was killed under the Sixth Street crossing, switching cars.

Q. You don't recall any other case?

A. No sir.

Q. Did you have a conversation with Crockett within the last week?

A. I met Davy—that is Davy met me—let's see, I believe it was last Saturday, one day last week I believe it was, and spoke a few words, and I saw him today and spoke a few words.

Q. Did you tell Crockett when you saw him last week that your testimony in this case would not hurt him?

A. No sir, I did not.

Q. Did you decline to tell him what you knew about the case?

A. No sir, I did not; he never asked me.

Q. What conversation did you have?

A. Nothing only just a general conversation about—he wanted to know if I was summoned here, and I told him I was, and all the conversation that passed between me and him was, he says, well, I hope the boys will only tell the truth. That was all that was said.

Q. And he has always, so far as you know, told the truth?

A. That is the remark——

Q. He has, so far as your relations with him, told the

167 truth?

A. So far as I know, yes sir.

Q. Your experience with him is that he told the truth?

A. Yes sir.

Q. And you insist that—you tell this jury that that man is not entitled to full faith and credit on oath?

A. I did not mean to say that I would not; I told you on the reputation of the people that he lived around, that we work with.

Q. You tell that to the jury at the same time that you tell the jury that he always told you the truth?
A. Yes sir.
Q. How high are the drawbars?
A. How high?
Q. Yes?
A. At what point?
Q. I mean the gripping part?
A. The center of it?
Q. No, no; the gripping part of the drawbar, the knuckle?
A. Well, the center line from the top of the railway to the center of the knuckle is supposed to be between 31 and about 34 inches.
Q. I am not asking you what they are supposed to be; I am asking you how high the knuckles are, the gripping knuckles, that grip each other?
A. Oh, you mean the surface, the face of the knuckle?
Q. Yes sir.
A. Well, I think they are about seven inches or eight.
168 They only show seven to eight inches.
Q. They grip each other when they are in good order?
A. With a surface of about seven or eight inches. There is a difference in the width of the knuckles; there is some difference; some knuckles have a friction surface of about seven inches and some possibly eight, somewhere along there.
Q. Now, in talking about the standard height of drawbars, how do you reach the conclusion as to what a standard height is?
A. If we find a car amongst a cut of cars that is below the average, it is evident that that car is low; or, if it is high, it is high; because it don't parallel with the cars joining it, which would be because the end of that car was out of order, because it don't reach the standard of the cars coupled to the front end and the back end of it.
Q. Let me see how that would work. If two cars are run over a low joint, one of them on a low joint and the other one on a solid rail, will that have a tendency to tilt the front end of the car one way and the back end of it the other way?
A. Sure, it would have some tendency.
Q. Would that have a tendency to lower the drawbar?
A. It would.
Q. At one end, and lower it at the other?
A. Slightly, yes.
Q. What do you mean by "slightly"?
A. Well, a small variation of maybe an inch or an inch and a half.
169 Q. That would depend on——
A. It would vary on account of the car which has two center bearings.
Q. That would depend upon the lowness of the joint, would it not?
A. If a joint was low it would have a tendency, yes, to vary it.
Q. The lower the joint the greater the variation would be?

A. Certainly, the lower the joint would be the greater the variation would be.
Q. Were you there the day Crockett got hurt?
A. Yes sir.
Q. Did that engine break loose from those cars?
A. I suppose it did. I was behind it and I heard the engineer blow the break-loose signal.
Q. You heard the engineer blow the break-loose signal?
A. Yes sir.
Q. Was Crockett working up to that time?
A. He was working with a crew of about six men.
Q. Did he work any after that?
A. I could not say whether he did or not.
Q. Did you go to the hospital to see him within the next 18 days after that?
A. No sir, I did not.

Witness excused.

170 J. A. SAYLOR, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business?
A. Foreman of the Coster yards.
Q. Section foreman?
A. Yes sir.
Q. Do you have charge of the tracks out there in the Coster yards?
A. Yes sir.
Q. Looking after their condition and repairing them and keeping them up?
A. Yes sir.
Q. That is your business?
A. That is my business.
Q. Did you have a job, that job in October, 1910, on the 15th of October?
A. Yes sir.
Q. Had you had for sometime before that?
A. For something like two years.
Q. About two years; where were you on the 15th of October, 1910; were you out there in the yards?
A. I was in the yard somewhere; I don't remember where.
Q. Do you remember of hearing of the cars breaking loose out there about the junction of 9 and 10 on that day?
A. Yes sir.
Q. Did you examine the track there on that date?
A. I don't remember whether I examined it on that par-
171 ticular day or not.
Q. After the cars broke loose?
A. No, I don't remember about that particular day.

Q. What was the condition of the track along there on this lead and on this track number 9 here?

A. It was in fairly good condition, that is, as to surface and align-.

Q. In safe condition for operation?

A. Yes sir.

Q. Something has been said about a marshy place on some of these tracks. Do you know of any such place existing out there at that time?

A. No, there wasn't any marshy place. The only place was down —there was a water main put across the yard something like, I will say 20 or 25 car lengths from the lead.

Q. Here was 9 coming into the lead?

A. Yes, it crossed the entire yard.

Q. Down here, somewhere?

A. Yes sir.

Q. Was that anywhere near where these cars broke loose?

A. No, no; it was 20 or 25 car lengths.

Q. Below that?

A. Yes sir.

Q. So that did not have anything to do with cars breaking loose up here at all?

A. Oh no, not up here.

Q. Do you know anything about the engines?

A. No sir.

Q. How well acquainted were you with Davy Crockett?

172 A. Why, I have known Davy for—I just know him when I see him—for some eight or ten years.

Q. Do you think you know his reputation, the estimate in which he is held by the men who works with and associates with him in the neighborhood there?

A. Why, I have heard a good many men express their opinion-.

Q. Do you think you know what his reputation is then?

A. Yes, I know that.

Q. Is that reputation or character good or bad, Mr. Saylor?

A. Well, I couldn't say it was very good.

Q. From that character is he entitled to full faith and credit on his oath?

A. That is a pretty hard question to answer, Mr. Smith.

Q. Well, all right. Do you know anything about Crockett being in bad health before this time, of these cars which broke loose?

A. I have heard, yes, I have heard he was in bad health.

Q. Do you know anything about it from him; did he tell you anything about being sick?

A. I don't remember whether it was before or just after, but it was sometime right along about that time.

Q. He didn't work out there any more afterwards, did he?

A. Not that I know of, but I seen him sometime after that.

Q. How?

173 A. I seen him some few times after this time, but I don't remember whether it was before or after I heard him say something about having a dose.

Q. Did he tell you anything about having a case?
A. Well, that is what he was talking about, a case.
Q. Did he tell you about that?
A. He told me he had the clapp.
Q. Did he have a pretty bad case of it?
A. He just said he had got a case; he did not say how bad it was.
Q. Did he say he was doctoring for it and having a time over it?
A. No sir, he just told me he had a case; I don't know whether it was a bad case.
Q. How many times did he talk to you about it?
A. I don't remember of but one time.
Q. Was he looking pretty bad with it?
A. Why, I don't know; he was not looking so bad.

Cross-examination by Mr. GRIMM:

Q. What is your given name?
A. My initials?
Q. Yes sir?
A. J. A.
Q. How long have you worked for the Southern Railway?
A. Well, I don't remember just how long I have worked for it.
Q. You are working for them now?
A. Yes.
Q. Isn't it a fact that since 1910 the Southern Railway Company has rebuilt practically the entire yards at Coster?
174 A. No sir.
Q. It has not?
A. No sir.
Q. What did they do since then?
A. Well, they have laid some new 85 pound rail-.
Q. What have you done on track number 9 since that time?
A. We have not done anything.
Q. Not a thing?
A. Oh, we may have put in a few bolts or probably put in a frog.
Q. You did not put in any cross ties?
A. No sir, not a cross tie.
Q. You did not raise a low joint?
A. No sir, there hasn't been a jack on number 9.
Q. How do you remember that so well?
A. I am right on it and doing the work.
Q. There was nothing done on track number 9?
A. Nothing more than we put in and tightened up bolts and put in a few angle bars.
Q. What did you tighten the bolts for?
A. To hold the joints together, tighten up the bolts through the angle bars.
Q. What else did you do?
A. Well, probably—I couldn't say for sure, but probably we have put in a switch point or a frog; I don't remember about that.
Q. You tell me that track is how long?

A. I don't know.

175 Q. Well, about how long?

A. I would guess about—between 3500 and 4000 feet.

Q. That is three-quarters of a mile long?

A. Right at it; I am just guessing at it.

Q. Do you tell me that in two years you have not put a cross tie in that track?

A. No sir, there has not been a cross tie put in that track in two years. The yard is divided something like half way or a little over half way, and I just go down to the center of the yard. I am speaking of my part of the yard, that I have charge of. The lower end of the yard another man has charge of it, and probably he has put in some ties down there or probably has not. I don't know; I could not say about that but I am talking from where I have charge of it.

Q. What part of the yard have you got charge of?

A. The upper end.

Q. What do you mean by the "upper end"?

A. We call that the upper end of the yard (indicating on drawing); the yard is on a grade, probably a one or a one and one-half per cent grade, and we call that the upper end of the yard.

Q. How far does the upper end of the yard extend down?

A. About half way or a little over. It takes in this territory over here (indicating).

Q. How high are the knuckles on those drawbars where they grip?

A. I don't know.

Q. You have seen a thousand of them; tell the court an- jury how high they are; how wide they are?

176 A. I don't know.

Q. The gripping surface?

A. I don't know.

Mr. SMITH: Judge, he has proved it by all the witnesses, and nobody disputes it at all.

Redirect examination by Mr. SMITH:

Q. Your part of the yard embraces these tracks along here where 9 and 10 come together, does it?

A. Yes sir, my part of the yard.

Q. And runs on how far down on number 9?

A. Well, it is a little over half way.

Q. Down about half way of number 9 track?

A. Yes sir, a little over half way.

Q. You say you have not had a jack under these tracks anywhere?

A. No sir, there has not been a jack along that track anywhere.

Q. Have these tracks been used there?

A. Yes sir, every day.

Q. They are crossed and run over every day of the world?

A. Yes sir.

Q. By a great many or just a few?

A. It would be hard to estimate how many cars there were.

Q. Are there a great many of them run over there every day?
A. Yes sir.
Q. Do you know of any cars getting—breaking loose from the engine since you went to careing for it?
177 A. No sir, I do not.

Recross-examination by Mr. GRIMM:

Q. Was it a frequent occurrence, a daily occurrence before that time for trains to break in that yard and jump the track?
A. No sir, not at that time nor since.
Q. Isn't it a daily occurrence now?
A. No sir, it is not.

Witness excused.

J. F. GRISSOM, the next witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. What is your business, Mr. Grissom?
A. Now?
Q. Yes?
A. I am a United States Safety Appliance Inspector.
Q. You are in the employment of the Government?
A. No sir, for the Southern Railway Company?
Q. Were you in the employment of the Southern Railway Company in October, 1910?
A. I was.
Q. You knew Mr. Crockett here, did you?
A. Yes sir.
Q. Who worked out there in the yards?
A. Yes sir.
Q. What was your business at that time, what sort of work did you do?
178 A. Chief car inspector of the Coster yard.
Q. Where were you when these cars broke loose up there at the time this man claims to have got hurt?
A. I couldn't tell you exactly what part of the yard I was in.
Q. It was in the yard somewhere; did you hear about it afterwards?
A. Yes sir.
Q. Did you go up there to the cars to see whether there was any damage done?
A. No sir, I started down there to the cars——
Q. Did you see the cars there on the track?
A. Yes sir.
Q. How far down number 9 were the cars that these cars ran into?
A. I suppose they were about 8 or 9 car lengths possibly from the lead.
Q. From the lead?
A. Yes sir.
Q. Was that track number 9 full of cars when you went up there?

A. Yes sir, comparatively full.
Q. Was that string in the clear when the cut ran down on number 9, did it clear number 10?
A. It cleared the lead, yes sir.
Q. How much?
A. Well, possibly—maybe two car lengths; maybe three; I would not say positively.

179 Q. You did not examine the cars to see whether there was any damage done then or not?
A. No sir, I did not; not at that time.

Q. Do you pass over those tracks along there pretty frequently?
A. Yes sir.
Q. What was the condition of the track along there about where 9 and 10 come together—on 9 and 10?
A. Good, so far as I could see.
Q. Did you have any conversation with this man Crockett about getting hurt there?
A. Yes sir.
Q. Did he tell you about it?
A. Why, I understood that Mr. Crockett got hurt, and I met up with Mr. Crockett and asked him how came him to get hurt, did any grab-iron pull off of the car or any defect——
Q. Why did you ask him about it?
A. Because I was the chief inspector and supposed to make a report of all such accidents as that that happened, and Mr. Crockett informed me that there was no defect about the car, and as well as I remember he told me that he went to swing off of the car and stepped on some rolling substance and wrenched his back or hurt his back to some extent.
Q. Stepped off the car onto something?
A. Yes sir, on the ground.
Q. When was it he told you that?
A. It was possibly 9:30 or 10:00 o'clock.
Q. That same day?
A. The same day, yes sir.

180 Q. Did you know anything about his being sick at that time or in bad health or suffering from any disease?
A. Well not personally, I did not. It was the general rumor there that he was sick.

Q. Yes; you need not tell that if you don't know anything about it from Crockett; did he tell you anything about having a case or a dose—anything of the kind?
A. No sir, not at that time.
Q. Are you acquainted there with his general reputation among the men, the people he associates with and works with—his general character?
A. Well yes sir, fairly good.
Q. Is that good or bad?
A. Well, it is not so good.
Q. From that general character is he entitled to full faith and credit on his oath?

A. Well, I could not say unless—if he was involved I would not say he was; I could not say that he was.

Cross-examination by Mr. GRIMM:

Q. I believe you say that you work for the Southern Railway Company?
A. Yes sir.
Q. You get your pay from the Southern Railway Company?
A. I do; yes sir.
Q. How many lawsuits have you been witness in for the Southern Railway Company?
A. This is the first one.
Q. The first one you have ever been in?
A. The first one that ever I taken the witness stand; this is the first time I ever went on the stand.
181 Q. Why didn't you go down and examine that engine that morning?
A. How is that?
Q. Why didn't you go down and examine that engine that morning?
A. Why, I am a car inspector and not an engine inspector.
Q. Why didn't you go down and examine the drawhead of those cars where that collision occurred—where they broke loose?
A. I have men there to inspect that.
Q. You did not do it?
A. No sir.
Q. You know that it is your duty as an inspector to inspect the drawhead on the engines as well as on the cars, don't you?
A. When there is any defect on them, sir.
Q. But you did not look for a defect that morning?
A. My attention was not called to it as being any defect there.
Q. You knew that the engine broke loose from those cars?
A. Yes sir.
Q. And that did not call your attention to it?
A. Yes, that called my attention to it.
Q. Why didn't you go and inspect it?
A. There was no defect about the engine.
Q. How do you know if you did not inspect it?
182 A. Because I inspected it every morning and kept it inspected.
Q. How do you know if you did not inspect, how do you know a thing that you did not see?
A. How do I know there was no defect on the engine?
Q. Stand aside.
A. (No answer.)

Redirect examination by Mr. SMITH:

Q. He asked you if you did not get your pay from the Southern Railway Company?
A. Yes sir.

Q. You would not work for them very long unless they did pay you?
A. No sir.
Q. And you earn all that you get from them?
A. I certainly do, I think.

Witness excused.

Court adjourned until nine o'clock a. m. Wednesday, October 16, 1912; at which time same resumed pursuant to adjournment. Defendant closes.

183 *Plaintiff's Rebuttal Evidence.*

D. E. CROCKETT, recalled, in rebuttal, testified as follows on his own behalf.

Examination by Mr. GRIMM:

Q. Mr. Crockett, did you tell Lee Moore that you were suffering from a case of gonorrhea?
A. No sir.
Q. Did you tell J. F. Wright that you had a case of gonorrhea?
A. No sir, I told J. F. Wright that I thought I was taking a case out there when I came back from Johnson City.
Q. Did you tell B. V. Moore that you had been drunk?
A. No sir.
Q. Had you been drunk?
A. No sir; I had taken a drink or two at Johnson City.
Q. Were you suffering from a case of gonorrhea?
A. No sir.
Q. How many drinks of whiskey did you take while you were at Bulls Gap?
A. I taken one on the 19th of January with a fellow that came from out on the Virginia & Southwestern by the name of Redwine, one drink on the 19th.
Q. Was that all the whiskey that you drank while you were up at Bulls Gap?
A. No sir, I taken one or two with Joe Justice, a fellow I traded with during the time I was there.

184 Q. Had you taken any drink at all the day that you went up to some house—I forget the name—and laid down at night and went to sleep?

A. No; that was the next morning. In the after part of the night I taken one drink the evening before.
Q. Huh?
A. I taken that drink on the 19th, the evening before, and that was after midnight, you know that I laid down up there at the office.
Q. What time of night did you lay down?
A. It was after twelve.
Q. After twelve o'clock at night?
A. Yes sir.
Q. Why did you go down there and lay down?

A. Because there wasn't anything to lie down on, and we had not had any supper, and we had been at the coal tipple and I had started back to the office and told the boys I was going back and take supper.

Q. What day was that?

A. That was the night of the 19th of January.

Q. That was the night of the 19th of January?

A. Yes sir.

Q. And you worked how long after that?

A. I worked up to the 23rd.

Q. You worked up to the 23rd?

A. Yes sir.

Q. Did you work on the 23rd?

A. Yes sir.

Q. State whether or not you got permission to get off on
185 the 23rd?

A. I told Mr. Hurd the yardmaster——

Mr. SMITH: You went into that yesterday—they went into that yesterday, that part of it.

A. (cont'd.) That I wanted off to come to Knoxville after my wife.

Q. Did he give you permission to get off?

A. Yes sir, he let me off 30 minutes earlier in order to catch the train.

Q. 30 minutes before your quitting time?

A. Yes sir.

Q. Is there a ticket in here, a January time ticket for January 22 and January 23?

A. No sir.

Q. It is not necessary for you to look. Did you take it out?

A. No sir.

Q. Did your lawyer take it out?

A. No sir, not to me he did not, no.

Q. Did I call your attention to the fact that they were not there as soon as we got to the office last evening?

A. Yes sir.

Q. When do you say was the first notice you had that you could not work any more at Bulls Gap?

A. I did not understand you?

Q. When do you say you got the first notice that you could not go back to work at Bulls Gap?

Mr. SMITH: He went into that on yesterday.

The COURT: Yes, that was passed over yesterday thoroughly.

Q. Did you have a conversation with the witness Wright
186 about injecting something into your penis, that you were talking about yesterday?

A. No sir. He said if I had a case of the clapp for me to go to Stevenson's and get a syringe and——

Q. He said for you to do that?

A. Yes sir, he said to go to Stevenson's.
Q. Did you tell him you had anything of that sort?
A. No. I said I believed I was taking a case; that was after I came back from Johnson City in September.
Q. Did you ever tell Saylor that you had a case of gonorrhea?
A. No sir, I don't remember saying anything at all to Saylor about that.
Q. Did you tell John Grissom that there was no defect about the car or the engine?
A. I don't remember talking to Grissom anything about the car.
Q. Did you tell anybody there was no defect about the engine or car?
A. There was not anything the matter with the car; it was the engine was the one that was giving trouble.
Q. It was the engine?
A. Yes sir.
Q. Did you tell Grissom that you were injured by stepping off of the car and wrenching your back?
A. No sir.
Q. You did not tell him that?
A. No sir. After I got out of the hospital the first trip
187 in the yard, I remember going down through the yard towards the office going to catch a car coming back to town, and Grissom and one other man was sitting on a cab on the new track and he asked me what I was walking so carefully about, and I told him that every time I stepped in a low place or stumbled on anything that it seemed like my bowels was falling out, I was hurting so bad through the back; that was about the sum and substance of our conversation there at the cab track.
Q. About how often did Dr. Miller, the company's physician, come to see you while you were with him at the hospital?

Mr. SMITH: That is original proof, if your Honor please.
The COURT: Yes; that is new entirely.

Q. Who nursed you while you were at the hospital?

Mr. SMITH: That is proof in chief.

Cross-examination by Mr. SMITH:

Q. You say this engine had been giving you some trouble?
A. Yes sir, it had been coming detached from the cars very often.

Mr. GRIMM: We have gone over that in chief.
Mr. SMITH: Yes, but you asked him that on cross examination.
The COURT: What was the question?
Mr. SMITH: He asked him about the engine giving him trouble, and now I am cross examining him.
Mr. GRIMM: I simply asked if he told a certain witness that it was defective.
188 The COURT: He testified, however, that it was not a defective car but a defective engine, and he would have the right of cross examining on that.

Q. How long had you been noticing the trouble with the engine?
A. It had been several days coming loose occasionally.
Q. On account of being too low?
A. Too low and rough places in the track.
Q. You had noticed that, had you?
A. Yes sir.
Q. How near to this accident was it?
A. How near to the accident?
Q. Yes, that you noticed it?
A. It had pulled loose two times on tracks in the yard.
Q. I am talking about this engine?
A. You can go out there in the yard anywhere and start it with a cut of cars and it will pull loose two or three times.
Q. How near to the time of this accident was it that you noticed that?
A. Oh, five or six days beforehand.
Q. Had it been that long before, had you noticed it that day, the day before or the day before that and on?
A. Yes sir, it came loose a time or two that morning in coupling up number 1 and number 2; it pulled loose two or three times.
Q. And you knew this track there was low too, did you?
A. The track was rough.
189 Q. You knew that?
A. Yes sir.
Q. You say you just took one drink, Crockett?
A. Yes sir, I taken a drink with Tom Redwine; he had just had a good drink, and we divided it on the 19th of January at Bulls Gap.
Q. While you were up at Johnson City, where you suspicioned that you might be taking something bad?
A. Yes sir, that I went to Johnson City in September during the Carnival up there; I think it was the 25th, 26th and 27th.
Q. You were in strange company up there?

Mr. GRIMM: I submit we have gone over all that.
Mr. SMITH: All right, I withdraw that question.

Q. You only took one drink on that trip?
A. Oh no; it was not on the trip that I taken that drink, you see.
Q. You did not take any on that trip?
A. I was talking about the night of the 19th of January at the time they claim I was asleep up there.
Q. You did not take any on the trip?
A. Yes sir.
Q. About how many did you take on that trip?
A. I never counted them particularly. I might have taken one or two or maybe three.
Q. There were not so many that you could not have counted them?
A. I could if I thought it was necessary; I was not working; I was laying off; I went to Johnson City and Bluff City.

190 Q. Now, you made application for membership in the Trainmen's organization, did you not?

Mr. GRIMM: I object; what has that got to do with this lawsuit?
The COURT: That is entirely new matter, is it not; that is entirely new matter.
Mr. SMITH: Well, probably it is.

Witness excused.

E. L. WELLS, the next witness called on behalf of the plaintiff, in rebuttal having been duly sworn, testified as follows:

Examination by Mr. GRIMM:

Q. Are you a deputy sheriff of Knox County?
A. Yes sir.
Q. Did you get the subpœna of the Southern Railway Company for its witnesses in this case?
A. I did, yesterday morning.
Q. Did it give you a subpœna for superintendent Deuel?

Mr. SMITH: I object to that; that is wholly immaterial.
Mr. GRIMM: We will see.
Mr. SMITH: I say it is immaterial now.
The COURT: I do not see the relevancy of it.
Mr. GRIMM: The relevancy of it is this: This man testified to having a conversation with Mr. Deuel. This man told what took place in that conversation. I propose to show that Mr. Deuel
191 resides in Knoxville; that he is an employé of the defendant company; that he was available for the purpose of coming here and contradicting this man, and they have not brought him here.
Mr. SMITH: It is proof against us when he is not put on the stand.
The COURT: Didn't you subpœna him?
Mr. GRIMM: I did not have to subpœna him.
The COURT: If you wanted to use him, didn't you have to?
Mr. GRIMM: I did not want to use him, I want to show that the defendant did not bring him here.
The COURT: The fact is he has not been here.
Mr. GRIMM: Suppose he is in Texas, they could not have him here then.
The COURT: It is not necessary to show a fact that exists. He has not been put on the stand, Mr. Grimm.
Mr. GRIMM: I wanted to show this, and I want the record to be clear upon that subject, that superintendent Deuel, that Dr. Miller and Dr. Newman are all employés of the defendant company; and that they all reside in Knoxville.
Mr. SMITH: You can show that; and I object to that statement now, because he cannot show——
Mr. GRIMM: He has not been called as a witness, and I am going

to ask your Honor to instruct the jury on that question.

192 The COURT: I don't think it is proper to show that, or the necessity of it. You have the benefit of showing that without contradiction; it seems to me you have the same benefit.

Mr. GRIMM: Does your Honor hold it is not necessaray for me to prove it?

The COURT: Yes.

The above and foregoing was all the evidence introduced upon the trial of this case.

Thereupon the jury retired from the courtroom when the following proceedings were had:

Mr. SMITH: I want to make a motion that your Honor direct a verdict in this case in favor of the defendant company. It is entirely convenient for me, if your Honor prefers it, to just argue the whole question together and you can act on it at the close of the argument.

The COURT: I prefer to dispose of your motion first.

Mr. SMITH: All right; it makes no difference. If your Honor please, in the first place I think this motion is well taken, assuming that this man was really injured in the way that he claims he was, that there was a defect in the track, a defective condition of the engine which contributed to produce the breaking loose of these cars, for the reason that the plaintiff himself shows that he knew those conditions for a number of days, that they existed a number of days before this accident occurred; that this engine had

193 been giving trouble and the track was in bad condition for sometime before that, and he continued in the employment with that knowledge and therefore assumed the risks incident to that service. I think unquestionably that would be the rule that would have to be applied here, unless this Federal Employers' Liability Act cuts off the defense of the assumption of risk. I take the position that that Act does not cut off the defense of the assumption of risk, except with reference to safety appliances.

The COURT: As I view this case, the proof seems to be directed towards a defective knuckle or a defective appliance of some sort. That causes this case to drift, it seems to me, to the question of whether or not this accident, if there was an accident, was due in whole or in part to the negligence of the defendant company, its employés or agents or representatives, or to any defect in its cars, engines or appliances, etc. That being so it would bring it clearly in my mind within the Employers' Liability Act to be determined in the light of this proof upon the question of whether or — there was negligence subject to the rule of mitigation of damages if any by reason of negligence upon the part of the plaintiff. And I think it is a case not for the Safety Appliance Act but for the Employers' Liability Act. I overrule the motion and will allow the case to go to the jury upon that theory.

Mr. SMITH: I desire to reserve an exception, your Honor.

(The jury returned into open court.)

194 Thereupon, after argument by counsel before the jury, the court instructed the jury as follows:

GENTLEMEN OF THE JURY: This action is brought by the plaintiff, D. E. Crockett, for the benefit of himself, against the defendant Southern Railway Company, to recover damages for alleged personal injury. By the averment of the plaintiff's declaration his right to recover rests upon the provisions of the Federal Statute known as the Federal Employers' Liability Act of Congress.

It is averred in the plaintiff's declaration that the plaintiff on or about the 15th day of October, was in the employ of the defendant company, and that the defendant was then and still is a railroad engaged in the operation of various lines of railroad extending from and by way of Knoxville, Tennessee to Coster, Tennessee, to or beyond Middlesboro, Kentucky, and Bristol, Virginia, Asheville, North Carolina and Atlanta, Georgia, and Jellico, the border between Kentucky and Tennessee respectively, with the main tracks, switch yards, turnouts and side tracks thereto appertaining, having under its control and management divers and many engines, locomotives, trains and cars, and in its employment divers and many servants, agents and employés; that on or about the aforesaid date while the plaintiff was an employé of the defendant company and engaged in the discharge of his duties at or near Coster in Knox County, Tennessee, the defendant carelessly and negligently permitted or allowed its roadbed, tracks, side tracks, yards, switches and turnouts at said place so used to become be or remain rough, out of

195 surface, dilapidated, defective and improper on a heavy and hazardous grade at or near the place aforesaid, and the drawheads, couplers, drawbars or knuckles upon its said engine or locomotive tender or cars so used to be, or remain unsafe, defective and insufficient, the cars so propelled and handled by the defendant company to become, be or remain without safe or sufficient hand brakes, etc., or to have a sufficient number of brakes properly set upon said engine, locomotive train or cars for the safe control during operation. It is further alleged or averred that the defendant unlawfully, negligently and carelessly permitted or allowed some of its drawbars upon its said engine, locomotive, tender or cars so used to become be and remain otherwise than of standard height; that defendant knew or could have know- of these conditions by the exercise of ordinary diligence, and by reason and on account of which the defendant's said engine, train and cars being propelled over and across defendant's said rough and unsurfaced dilapidated and improper roadbed side track yard, switches, turnouts on said heavy and dangerous grade in the manner aforesaid, became unfastened and uncoupled and said trains or cars ran, bumped or crushed against or into other cars or trains thereby stopping and hurling plaintiff from or off of one of said trains and injuring him, causing him to incur medical expense and endure much pain and suffering and inflicting upon him permanent injuries. It is upon these averments that the plaintiff bases his right of action and seeks a recovery against the defendant.

To plaintiff's declaration defendant pleads not guilty, thus put-
ting at issue all of the essential and material averments in
196 the declaration.

The said Federal Employers' Liability Act provides that a common carrier by railroad while engaged in interstate commerce shall be liable while so engaged in damages to any person suffering an injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, etc. contributing in whole or in part to such injury.

It is further provided in said Act that the contributory negligence if any of the employés shall not wholly defeat the action, but shall be considered by the jury in mitigation or lessening of damages in the manner hereinafter stated.

To entitle the plaintiff to recover in this case, it is essential that he shall prove, by a preponderance, that is the greater weight of the evidence, the following: First; that the defendant company was at the time the injury was inflicted, if the proof shows that such injury was inflicted, a common carrier by railroad engaged in interstate commerce; second; that plaintiff was at the time of his injury, if he was injured, employed by and working for defendant company in such interstate commerce; third; that plaintiff was injured, if at all, while thus employed in defendant's interstate business; fourth; that the injury was the direct and proximate result in whole or in
part of the negligence of some officer, agent or other employé
197 of the defendant company or was the result in whole or in
part of some defect or insufficiency in its cars, engines, appliances, etc., due to the negligence of defendant company or its agents and employés.

I instruct you that the defendant company would be engaged in interstate commerce within the meaning of said Act at the time of plaintiff's injury, if its engine or locomotive and cars or trains by which plaintiff was injured was or were on a journey and performing a trip from a point within the State of Tennessee to a point without the State of Tennessee operating the same by steam and over its lines ordinarily used for the transportation of trains and traffic through and from the State of Tennessee to a point in another state, and this would be true whether the cars being transported were empty or loaded, and it would be true although the transaction may have occurred in the yards of the Railway Company if such yards were used for the transfer, breaking up and making up of trains brought in or sent out or merely being transferred upon the yards in the course of their journey, and it would be sufficient for this purpose of showing that the defendant was engaged in interstate commerce that the distribution of said train or cars was from a point within the state of Tennessee to another and a different point within Tennessee if on this journeey it passed through a portion of another state where there were stations at which they ordinarily stopped in due course for the receipt and delivery of freight or for switching

purposes, then the defendant would be engaged in interstate commerce.

The fact that the injury occurred in the yards of the company does not relieve the defendant from liability under said Act
198 provided the proof shows by a preponderance of the evidence that such yards were ordinarily and indiscriminately and interchangeably used in the transfer or the company's interstate trains and cars over its lines, although this may be done concurrently with the use of the same yards in the transfer of intra-state trains and business, that is business wholly within the state, provided the intra-state trains or business were not separately and by itself transported but was intermingled indiscriminately with the interstate business.

Employés upon the yards of the defendant company who engage indiscriminately and without distinction in the handling of both interstate and intrastate trains, cars and business, are, within the meaning of this statute, engaged in interstate commerce. Yard switchmen and other like employés on the yards of the company, come within the purview of this Act when so engaged.

It is essential to plaintiff's recovery in this case, however, that there must be some fault or failure or negligence on the part of the defendant company, its other agents or employés that contributed proximately in whole or in part to plaintiff's injury, or the same must have been due in whole or in part to some defect or insufficiency in defendant company's cars, engines, knuckles, drawheads or other appliances, etc., the same existing by and through the negligence of defendant company, its agents or employés.

Negligence upon the part of defendant company will not be presumed from the mere happening of the accident; the negligence, as averred in the declaration, must be proven by the plaintiff.
199 Negligence in general terms has been defined to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or the doing of what such person under the existing circumstances would not have done or a failure to perform a duty required by law. In this connection I instruct the jury it was the duty of the defendant company, if engaged in interstate commerce, to maintain the drawheads on its cars and engines engaged in such interstate commerce of the standard height of from 31½ to 34½ inches from the top or level of the rail or track, and failure to do so would be negligence. Whether the drawbar was of proper height you will determine from the evidence.

In further considering the question of negligenc with reference to other aspects of the case, the jury will determine whether it was ngligence on the part of the defendant company and its other servants to have run the engine, locomotive, train or cars as was done in said yards over the same, including the same, including the track and roadbed in the condition averred in the declaration, if the same be shown to be true by the proof in the case. The rule for the determination of this case is whether a reasonably prudent man in the exercise of ordinary care would have done so. If the jury are of

the opinion that a reasonably prudent man in the exercise of ordinary care would have done so under the then existing conditions and circumstances, then the defendant company would not be guilty of negligence in that respect; otherwise it would be guilty of negligence that would render it liable for the injury inflicted, if any.

If the jury find that the plaintiff is entitled to recover upon
200 the facts of the case, then they will consider and determine whether the plaintiff contributed either directly or proximately or remotely to his own injury; in other words they will determine whether or not the plaintiff exercised the precaution for his own safety that a person of ordinary caution and prudence would have exercised under the existing conditions and circumstances, but, as before stated, no negligence on the part of the plaintiff may defeat this action. The jury must, however, take into consideration any negligence on the part of the plaintiff in mitigation or lessening of damages, and in doing so they must apportion the damages in due proportion to the negligence of the parties. For example, if the jury shall believe that the parties were equally negligent, then plaintiff would be entitled to recover only one-half of the amount that he would otherwise be entitled to recover; or if plaintiff's negligence was greater or less than that of the defendant, they will apportion the damages as nearly as they can in proportion to the negligence of the parties respectively. In assessing damages subject to the above rule, the jury will consider the mental and physical pain and suffering of the plaintiff if any caused by the injury; the necessary expenses incurred by reason of said injury such as doctor bills, medicines, nurse hire, etc., a loss or impairment of health and earning capacity, if any. If the jury find that plaintiff's sickness and disability are due to some disease—ailment or disease of plaintiff, not appearing from the declaration for which defendant company

was not responsible, then plaintiff cannot recover and your
201 verdict should be for the defendant. The jury are the exclusive judges, subject to the rules stated as to the amount of damages, except that the damages cannot be allowed in excess of the amount sued for and may be for any amount within the sum sued for. They are likewise the exclusive judges of the weight of the evidence and the credibility of the witnesses. In determining the credit of the witnesses they will look to their demeanor on the stand, the probability or want of probability in their evidence, to their character, if shown and to contradictions or impeachment of their testimony by other witnesses and such other facts appearing in the record as will cast light upon the true weight and credit to be given their testimony. The jury will determine the case in accordance with the weight and preponderance of the evidence, remembering that it is incumbent upon the plaintiff to make out his case by a preponderance of the evidence or greater weight of the evidence. But as to the matter of contributory negligence, the burden of proof is upon the defendant, though the jury may look to the entire evidence whether introduced on behalf of plaintiff or on behalf of defendant. It is your duty to consider the case dispassionately, without reference to the character of the parties and to render such

verdict as you deem just and right. If you find in favor of the defendant you will indicate the fact by reporting to the court that you find in favor of the defendant.

At the conclusion of the general charge, the court was requested to charge the jury specially as follows:

202 "If the jury should find from the evidence that the draw-bar of the engine was defective by being too low or the track defective and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and, plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges that under those facts the plaintiff could not recover and your verdict should be in favor of the defendant.

JOUROLMON, WELCKER & SMITH,
Att'ys for the Defendant."

The Court declined to give the foregoing request and his action was excepted to by the defendant. The Court then said, "Take the case gentlemen of the jury, retire and after calmly and dispassionately reviewing the same, you will make and report to the court such verdict as you think ought to be rendered under the law and the facts.

Thereupon the jury retired from the court room and after consideration returned into open court a verdict in favor of the plaintiff and against the defendant and assessed the damage at one thousand dollars.

Thereupon counsel for the defendant moved the court for a new trial, as shown by the minutes of the court, which motion having been argued and duly considered by the court, was overruled by the court. To which action of the court, counsel for the defendant excepted and now excepts.

Thereupon counsel for defendant prayed an appeal to the
203 next term of the Court of Civil Appeals sitting at Knoxville, Tennessee, and tenders this its bill of exceptions, which is signed, sealed and ordered to be made a part of the record in this case.

VON A. HUFFAKER, *Judge.*

Approved:

A. C. GRIMM, *Att'y for Plaintiff.*
L. D. SMITH, " " *Defendant.*

Appeal bond Filed 21st day of November, 1912.

J. A. WRINKLE, *Clerk.*

STATE OF TENNESSEE,
Knox Co.:

Circuit Court at Knoxville, Tenn.

We, Southern Railway Company, Principal and Jourolmon, Welcker & Smith acknowledge ourselves indebted to D. E. Crockett in the penal sum of Two Hundred and Fifty Dollars, for the payment of which we bind ourselves, our heirs and personal representatives jointly and severally by these presents; but to be void, if the said Southern Railway Company shall effectively prosecute its appeal taken to the Court of Civil Appeals of Tennessee, to be held at the Court House in Knoxville, on the first Monday of May next, from a judgment rendered against it in the Circuit Court at Knoxville on the 16th day of October, 1912, in the case of D. E. Crockett vs. Southern Railway Company in said Court, or failing therein, shall pay the amount adjudged against them with interest and damages, and also satisfy the judgment that may be rendered against them by the Court of Civil Appeals in the premises.

Witness our hands and seals the 21st day of November, 1912.

204 (Signed) SOUTHERN RAILWAY CO.,
By L. D. SMITH, *Attorney.*
JOUROLMON, WELCKER & SMITH.

Bill of Costs.

State Tax	$2.50
County Tax	2.50
Clerk, J. A. Wrinkle:	
Pauper Oath 75; Fil. Dec. 25; Fil. Plea 25; Orders 25; 3 Continuance 75; Motions 75; Respitals Jury 25; Judg. Final 75; 4 duces tecum 1.00; Subp. for 68 wit. 6.80; 32 wit. probates 1.60; 4 docketing 1.20; Fi. Fa. and copy of costs 25; 2 notice 50	16.60
G. W. Monday, D. S. Ex. Sums	1.00
E. J. Thomas, " " Sup. 12 wit	3.00
M. A. Walker, " " " 1 "	.25
A. L. Wells, " " " 34 "	8.50
Thos. Brown, " " " 1 "	.25
H. T. Turner, " " " 13 "	3.25
Jno. Trotter, " " " 2 "	.50
Witnesses:	
J. R. Godfrey, 3 days	3.00
W. R. Yeager, 3 "	3.00
D. S. Snyder, 1 day	1.00
W. M. Miller, 1 "	1.00
J. A. Plumlee, 1 "	1.00
C. S. Turner, 1 "	1.00
W. S. Rumbley, 1 "	1.00
T. L. Gammon, 3 days	3.00

205

Will Henderson,	2 Days		2.00
C. E. Miller,	1 Day		1.00
A. L. Rader,	1 Day		1.00
F. C. Simpson,	1 Day		1.00
W. T. Day,	1 Day	(Assigned to Sou. Ry. Co.)	1.00
G. M. Hurt,	1 Day	" " " " "	1.00
J. T. Grissom,	1 Day	" " " " "	1.00
L. W. Schultz,	1 Day	" " " " "	1.00
J. A. Saylor,	2 Days	" " " " "	2.00
R. E. Hurd,	1 Day	" " " " "	1.00
J. H. Dowling,	1 Day	" " " " "	1.00
J. F. Wright,	1 Day	" " " " "	1.00
B. V. Moore,	1 Day	" " " " "	1.00
E. R. Moore,	1 Day	" " " " "	1.00
C. A. Snoddy,	2 Days	" " " " "	2.00
			$70.35

Clerk J. A. Wrinkle:

This transcript 53,100 words at .10 per hundred—$53.10; appeal bond and order of appeal .75; certificate and seal .50 ..... 54.35

Certificate.

I, J. A. Wrinkle, Clerk of the Circuit Court for Knox County, Tennessee, hereby certify that the foregoing is a true, full and complete copy of the record, pleadings, and bill of costs in the above styled cause as same appears of record now on file in my office.

Witness my hand and seal of the court this December 23, 1912.

(S.) J. A. WRINKLE, *Clerk.*

206 Filed May 19, 1913. S. E. Cleage, Clerk.

In the Court of Civil Appeals at Knoxville, Tennessee.

No. 30. Knox. Law.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

D. E. CROCKETT, Defendant in Error.

Assignments of Error & Brief of Southern Railway Company.

Statement of the Case.

This is an action for personal injuries in which there was a verdict and judgment in favor of the plaintiff in the court below for $1,000.00.

The declaration alleges that the plaintiff below was injured while being employed by the defendant as a switchman, and while he was in the act of going upon the cars for the purpose of setting the brakes, by reason of the engine becoming detached from the cars and allowing them to run into other cars producing a jolt or jar by the collision which threw him down on the car. The declaration states the cause of action in three counts, the only material difference in them being that in one count the right to recover is alleged to exist under the Federal Employers' Liability Act by reason of the fact that the defendant railway company was an interstate carrier by railroad and the plaintiff was in its employment and engaged at the time in the movement of interstate commerce. The declaration avers all kinds of defects and deficiencies in the cars and in the track and the negligence of fellow servants. (Tr. p. 2-7.)

207 But the only negligence which the proof tends to show is that the draw bar of the engine was too low and that the track was in bad condition, and that these defective conditions allowed the engine to be detached from the cars, which, as a result thereof, ran down the track with such force as to cause a collision with other cars standing on the same track.

The facts of the accident as detailed by the plaintiff himself are: He was a switchman in the Coster Yards of the company where trains are made up and cars distributed to various tracks. The tracks are built on an incline so as to permit the cars to move by gravity. It was plaintiff's business in connection with these switching operations to ride various cars on to the various tracks to which they were designated to be moved. Just before the accident occurred plaintiff was standing on the ground near the junction of tracks number nine and ten. A cut of cars was being pulled up the track on number ten track to be pushed by the engine down on to the track number nine. While these cars were being moved the foreman of the crew called plaintiff's attention to the fact that he ought to be on the car. There were some eight or ten cars in this cut. The engine being in the rear pushing the cars down the grade. Plaintiff got on the front end of the car next to the engine and while he was going around the corner of the car the engine became detached and allowed the cars to roll down the grade. When plaintiff discovered that the engine was detached he started to the brake to control the movement of the cars and before he reached the brake the cars ran into another cut of cars standing on the track, and, he says, struck with such force as to cause him to fall forward. (Tr. pps. 16-24, and 40-48.)

208 The evidence does tend to show that the engine came loose from the cars without design and the plaintiff testified, although there was much proof to the contrary, that the draw bar of the engine was low and that there were low joints in the track and that the track was otherwise in bad condition. (Tr. p-. 21-24.)

The plaintiff further testified, and there is no controversy upon this point, that the defective condition of the engine to which he referred had existed for several days prior to the accident and that he knew it

and that he further knew that the engine had been coming loose from the cars on account of this condition and that it had occurred twice on this same day before the accident. He also testified that he knew of the defective condition of the track over which this particular engine had been operating. (Tr. pp. 22, 48, 162, and 163.)

After the introduction of all the evidence plaintiff in error moved the Court to peremptorily instruct the jury to return a verdict in its favor, which motion the Court overruled. (Tr. pp. 166 and 167).

After the general charge to the jury the court was requested to charge the jury that if they found from the evidence that the draw bar of the engine was defective by being too low or that the track was defective and that this caused the engine to become detached and resulted in plaintiff's injury, but should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff and that he knew before he went to work that the defects existed and that by reason thereof the engine had become accustomed to become uncoupled and that he appreciated the danger, the plaintiff could not recover. The Court declined to give that request. (Tr. 174.)

209 After the verdict plaintiff in error interposed its motion for new trial, which was overruled, and thereupon this case was appealed to this court. (Tr. pps. 10, 12 and 13.)

Errors.

1. The Court was in error in not sustaining the motion made by the plaintiff in error for the jury to be peremptorily instructed to return a verdict in its favor. This was error for two reasons. In the first place, there was no proof tending to show that the injury resulted from the defective condition of the engine and track. These defective conditions, if they existed, may have had something to do with the engine becoming detached from the cars, but the fact that the engine became detached is not known to have been the proximate cause of the injuries sustained. In the second place, it is shown by the plaintiff himself without contradiction that before this accident occurred he was perfectly well informed of the defective condition of the engine and of the track and appreciated the danger incident to his work in connection with these defective conditions and therefore he assumed the risks incident thereto. Although the evidence tended to show that the plaintiff was engaged in interstate commerce and that the plaintiff in error, the railway company, was an interstate carrier engaged at the time in interstate commerce the Federal Employers' Liability Act does not abolish the doctrine of the assumption of risk under the common law.

2. The Court was in error in declining to instruct the jury as requested by the plaintiff in error as follows:

"If the jury should find from the evidence that the draw-
210 bar of the engine was defective by being too low or the track defective and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior

to that time with the knowledge of the plaintiff, and, plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges that under those facts the plaintiff could not recover and your verdict should be in favor of the defendant." (Tr. p. 174.)

Whether it can be said to be established as a matter of law that the defendant in error assumed the risks and could not therefore recover was certainly a question for the jury to decide as to whether or not the defendant in error did know of the defective conditions and appreciated the danger, and the request embraced but a sound proposition of the law based upon the assumption of the existence of facts which the evidence tended to establish.

Argument.

I take it that there will be no contention upon the proposition that the plaintiff in error did actually know before he went to work at the time he was injured, of the existence of the very defective conditions which he now claims brought about his injury, since in his own testimony to which we have referred, we find that these conditions had existed for several days prior to the accident and that he had
211 been at work with this same engine over these same tracks and that he had noticed the engine become uncoupled on account of the very conditions complained of and that the engine had become uncoupled twice on the very day of and before the accident.

I take it further that it will not be contended that under the common law this state of facts if proven would prevent a recovery because under such circumstances defendant in error would be held to have assumed the risk of being injured by defects of which he knew and the danger of which he appreciated.

Therefore, the only question upon this proposition will be whether or not the rule of the common law with respect to the assumption of risk was abolished by the enactment of the Federal Employers' Liability Act.

That the Federal Employers' Liability Act does not abolish the rule of assumption of risk under the common law I think is manifest upon a mere reading of the statute itself. It certainly does not in so many words abolish the rule. It does in so many words abolish the rule of non-liability for contributory negligence and it does in so many words abolish the rule of assumption of risk, where the injury resulted from a violation of the safety appliance laws. Section four of the statute provides as follows:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

It will be seen that the first section of the act makes no
212 change in the common law of liability for negligence except that it does make the company liable for the negligence of fellow servants, whereas, under the common law rule adopted in this state, an employer was not responsible for the negligence of fellow servants.

For the convenience of the Court we have attached to this brief a copy of the act in full.

This question was considered by this Court in the case of Southern Railway Company vs. Lee Howard, and the opinion of Judge Higgins dealing with the question in that case is as follows:

"It was urged in the court below that the doctrine of assumption of risk for defective appliances other than those required by acts of Congress relating to the safety of servants, remained as at common law. This view was taken by the learned trial judge and does not seem to be seriously disputed by counsel for defendant in error. There is room for controversy as to the soundness of this proposition. We are, however, inclined to the view that the position of plaintiff in error with respect thereto is correct because of express exclusion by the Act of cases where a statute is violated. This by implication excluded from the excepting clause of the Act all other phases of assumption of risk in so far as they are distinct from contributory negligence. We are the more inclined to this position for the reason that in a plain case of the assumption of risk, laying aside for the present the defense of contributory negligence, there can be no apportionment of responsibility or of damages between the master and the servant. There would either be a palpable assumption of risk upon the part of the servant wholly defeating his right of action, or there would be full liability upon the part of the master notwithstanding the unequivocal assent of the servant to the using of the defective appliance. We look for more controversy upon this subject until it is settled either by the courts or by the Congress more definitely.
213 There is good reason, again, for the contention that the defense remains in that the experience of those who have been governed by the common law has demonstrated that anything which prompts a servant to report defects to his master is conducive alike to the welfare of the servant and the master and also the public in general. It is also worthy of note as bearing upon the construction of this statute that the safety appliance act expressly took away the defense of the asumption of risk for a defective coupling arrangement. If this defense remains unaffected, the Federal statute is going to be considerable reduced in its operation as compared to its great breadth as it appeared to the Legislators when it was passed. But we see no other escape now if we adhere to settled rules of statutory construction."

It was held by the Court of Appeals of Georgia in Bowers vs. Southern Railway Company that under the Act of Congress prescribing liability for railroads for injury to employees, the servant may assume the risk except as to things violative of the statute.

10 Georgia Appeals, 367, 73 Southeastern, 677.

"Where the Legislature by statute extends the common-law liability of a master, the presumption will be that the limit of that extension is expressed in the statute itself, and the amendment of the factory act (Pen. Code 384 L, amended by laws 1897, p. 505, c. 416, sec. 3), which made a failure to comply with its provisions a crime, but which does not provide that an employé was not to be deemed to have assumed the risk inherent to any defect which in itself is a violation of the act, will not be construed as doing away with the employé's assumption of the risk.

Bushtis v. Catskill Cement Co., 113 N. Y. S. 294, 128 App. 780, judgment affirmed (1910) 92 N. E. 1079, 198 N. Y. 548."

214 "Assumption of risk and contributory negligence are distinct and separate defenses, and the former may be pleaded, although the defense of contributory negligence is precluded by statute.—Jackson v. Chicago, R. I. & P. Co., 178 F., 432, 102 C. C. A., 159."

"The doctrine of assumed risk is read into employers' liability act (Burn's Ann. St. 1901, Sec. 7083), making a railroad company liable for injuries to an employé, to whose orders the injured employé was bound to conform, and did conform, unless the injury was due to the negligent nonobservance of a positive and fixed duty required by statute.—Cleveland C. C. & St. L. Ry. Co. v. Bossert, 87 N. E. 158."

"A railroad company is not, under a statute making it liable for the negligence of an employee having charge of a signal, liable for the death of an engineer who ran into a switch negligently left open by such employee, where the signal upon the switch showed that it was open, and, in any event, it could not be seen because of weather conditions.

Chicago, I. & L. R. Co. v. Barker, 17: 542, 83 N. E. 369, 169 Ind., 670."

"If the servant has assumed the risk in the performance of the act wherein he was injured, and the defendant is not otherwise negligent, then such servant cannot recover."

Thornton on Federal Employers' Liability Act, section 85, p. 139, citing the following cases:

Kansas Pacific Ry. Co. v. Pointer, 14 Kan., 37.
The Scandinvaia, 156 Fed. Rep., 403.
The Saratoga, 94 Fed. Rep., 221; 36 C. C. A., 208, reversing 87 Fed. Rep., 349.
The Serapsis, 51 Fed. Rep., 92, 266; reversing 49 Fed. Rep., 393.
The Maharajah, 40 Fed. Rep., 784.
The Henry B. Fiske, 141 Fed. Rep., 188.
The Carl, 18 Fed. Rep., 655.

215 It was argued in the court below that the injury in this case resulted from a violation of the Safety Appliance Act of

Congress in that the draw bar on the engine was below the standard fixed by the Safety Appliance Act for freight cars. Our answer to this is that the Safety Appliance Statutes do not fix any standards for the draw bars on engines. Section 5 of the Safety Appliance Act provides:

"That within ninety days of the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, etc."

In pursuance of this provision which authorized the Interstate Commerce Commission to fix a standard for the height of draw bars the commission passed an order October 10th, 1910 providing for the standard height of draw bars for freight cars, but no regulation has ever been made by the commission regulating the height of draw bars for locomotives.

See Thornton on Federal Safety Appliance Acts, p. 461.

We submit, therefore, that the court below was in error either in not directing a verdict or in not giving in charge the request submitted by the plaintiff in error.

L. D. SMITH,
Att'y for Plaintiff in Error.

I hereby certify that on this day I delivered a copy of the foregoing assignment of error and brief to A. C. Grimm, attorney for the defendant in error. This May 19, 1913.

L. D. SMITH.

216 *Employers' Liability Acts.*

(Act of 1908.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents, and if none, then to the next of kin dependent upon such employé for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

"SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employé, to his or her
217 personal representatives, for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents; and if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, however, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

218 "SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employé, or the person entitled thereto, on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent

jurisdiction shall be removed to any court of the United States. (As amended April 5, 1910.)

"SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

"SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of
219 their employés under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled, 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employés,' approved June 11, 1906."

"Approved April 22, 1908.

SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

"(As amended April 5, 1910.)"

220 In the Court of Civil Appeals at Knoxville, Tennessee, May Term, 1913.

Filed May 23, 1913. S. E. Cleage, Clerk.

SOUTHERN RAILWAY COMPANY
vs.
D. E. CROCKETT.

From the Circuit Court of Knox County.

Reply Brief on Behalf of Defendant in Error.

Statement of the Case.

This is an action for personal injuries resulting to D. E. Crockett, an employé of the Southern Railway Company, a common carrier engaged in interstate commerce, occasioned by said Company carelessly and negligently permitting or allowing its roadbed, tracks, side tracks, yards, switches, and turnouts at or near Coster, in Knox County, Tennessee, to become, be, or remain rough, out of surface, dilapidated, and impaired, on a heavy and hazardous grade; the drawheads, couplers, drawbars or knuckles upon its said engine, locomotive, tender or cars so used to become, be, or remain out of repair, unsafe, defective, and insufficient, and to become, be or remain otherwise than of standard height, and on account of which the de-

fendant's said engine, train, or cars, on being propelled over and across the defendant's said rough, unsurfaced, dilapidated, and impaired roadbed, track, side track, yards, switches, or turnout, on said heavy and dangerous grade, became unfastened and
221 uncoupled, and said train or cars ran, bumped, or crushed together or into other cars or trains, thereby throwing or hurling the plaintiff from off of one of said trains or cars upon or against other cars, brakes, bumpers, or draw timbers, or other hard substance, thereby seriously and permanently injuring the plaintiff.

See Declaration, Tr. pp. 2, 3, 4, 5, 6, 7.

The Southern Railway Company interposed a plea of "not guilty."
Transcript, pp. 7 and 8.

The trial resulted in a verdict for $1,000.00 in favor of the plaintiff below.
Transcript, p. 9.

A motion for a new trial was made and overruled.
Transcript, p. 10.

Reply Brief.

I.

The sufficiency of the evidence to sustain the verdict is not challenged, and it is not even insisted that the verdict is excessive.

The action of the trial judge in overruling appellant's motion for a new trial is not complained of.

"The jurisdiction of this Court is exclusively appellate, and it can only pass upon matters which the record shows have been considered and adjudged by the trial court from which the case has been appealed. The errors reviewed and corrected by it are of two classes: Those which appear upon the face of the record proper, as erroneous rulings in sustaining or overruling motions and de-
222 murrers challenging the insufficiency of the pleadings; and errors committed in allowing or overruling motions for a new trial upon grounds brought into the record by bills of exception, as for imperperly refusing a continuance, the admission of incompetent evidence, or the rejection of competent evidence, errors in instructing the jury, or in refusing further instructions seasonably requested in proper form, for want of evidence to sustain the verdict, or other similar grounds. It does not act directly upon errors of the latter class, which are not a part of the record without a bill of exceptions, but upon the action of the trial judge for refusing a new trial because of such errors committed by him, or otherwise occurring in the progress of the case, as they may be waived or corrected before verdict."

R. R. vs. Johnson, 114 Tenn., 636, 637.

II.

On the second page of appellant's statement of the case will be found this statement:

"But the only negligence which the proof tends to show is that the drawbar of the engine was too low, and that the track was in bad condition, and that these defective conditions allowed the engine to be detached from the cars, which, as a result thereof, ran down the track with such force as to cause a collision with other cars standing on the same track."

On page four and in assignment of error No. 1 this further statement is found:

"These defective conditions, if they existed, may have had something to do with the engine becoming detached from the cars":

"It is shown by the plaintiff himself without contradiction that before this accident occurred he was perfectly well informed of the defective condition of the engine and of the track":

"The evidence tends to show that the plaintiff (in error) was an interstate carrier, engaged at the time in interstate commerce."

223 And from the language thus quoted, and the limited scope embraced within said alleged errors, as thus assigned, appellant seemingly concedes its liability, unless said negligence and defects were not the proximate cause of D. E. Crockett's injuries, or the doctrine of "assumption of risk" will shield it against liability.

The proximate cause of an injury may in general be stated to be that act or omission which immediately caused or failed to prevent the injury: an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, and it is the jury's province to determine the proximate cause of an injury, unless the facts are incontrovertible.

It is admitted on page 3 of appellant's brief that the evidence tends to show that the engine came loose from the cars without design; that the drawbar of the engine was low; that there were low joints in the track; that the track was otherwise in bad condition; that the defective condition of the engine had existed for several days; that the engine had come loose from the cars on account of this condition; that this had occurred twice on that same day before the accident—while on page 2 of appellant's brief it is admitted that the engine was in the rear pushing the cars down the grade; that the engine became detached while Crockett was climbing around the corner of the car and allowed the cars to roll down the grade; that Crockett started to the brake to control the movement of the car, and that before he reached the brake the cars ran into another cut of cars standing on the track and struck with such force as to cause him to fall.

"Q. Before you go further, where were you struck?

"A. Right in the small of the back. It threw me against the tunnel brake made of iron.

"Q. You were thrown from one car back against another car and hit on your back?

"A. Yes sir, it struck me in the small of my back.
223½ "Q. Then they struck again and knocked you against another car?
"A. Yes sir.
See Ev. D. E. Crockett, Tr. pp. 16, 17.

"Q. State whether or not you are able to do any work?
"A. No sir, I cannot do any work to say any work at all.
"Q. How much were you making a day when you were hurt?
"A. $3.20.
"Q. Have you been able to do any work since that time?
"A. Not but very little.
"Q. How much have you been able to earn since you were hurt?
"A. All put together, I have not earned $150.00 I don't suppose in all the two years since I was hurt.
"Q. And that was in October 1910?
"A. Yes sir, this morning two years ago.
"Q. What kind of a car were you on when this collision occurred?
"A. A Pennsylvania box car.
"Q. Was it a loaded or an empty car?
"A. A loaded car.
"Q. Where was it loaded for?
"A. It was marked destination Bristol.
See Ev. D. E. Crockett, Tr. pp. 18, 19.

"Q. State whether or not the other Pennsylvania car, the one you were thrown against, was loaded?
"A. Yes sir, they were both loaded for Bristol.
See Ev. D. E. Crockett, Tr. p. 20.

"Q. What was the condition of the drawbar on that engine?
"A. Why, it was rather low.
224 "Q. I am talking about the length of the drawbar that was attached to the car?
"A. Why, it was low. It wouldn't catch more than half the knuckle of the Pennsylvania car.
"Q. About how high was it from the center of the road (rail) to the center of the drawbar?
"A. Not more than two and one-half feet.
"Q. How wide was the knuckles on those drawbars?
"A. I think they run from eight to ten inches, something like that.
"Q. State whether or not this engine was used in connection with any other engine in drawing out or pushing out the loaded train?
"A. Well, yes.
"Q. Why did they hook 649 in front of 621?
"A. As a general thing, 649 would pull loose in pulling over a rough place and cause some trouble in pulling it out. If it pulled loose from 621 they could keep on and pull it over the hill.
"Q. Why did they do it that way?

"A. The engine had been giving them trouble in pulling loose.
See Ev. D. E. Crocket, Tr., pp. 21, 22.

"Q. What kind of a grade is there in the yard out there at Coster?
"A. It is a pretty steep grade.
"Q. State whether or not you keep what is known as car herders out there?
"A. Yes sir.
"Q. What for?
"A. Why, to set sufficient brakes on trains on tracks in the yard to hold them.
"Q. On standing cars?
"A. On standing cars, yes sir.
"Q. To hold them?
"A. Yes sir.
225 "Q. Why did they have to hold them?
"A. They would roll away from there.
"Q. On account of grade?
"A. On account of grade.
"Q. What track did it occur on?
"A. This occurred on Track No. 9.
"Q. What was the condition of track No. 9?
"A. It was in bad shape.
"Q. Bad shape, how?
"A. Why, it was rough and there was muddy, marshy places in it. There were places where the track would swing. The track would be in a loblolly.
See Ev. D. E. Crockett, Tr. p. 23.

"Q. About what portion of track No. 9 were you hurt on?
"A. It was something like one third of the distance, a little better than one third down into No. 9.
"Q. What was the condition of Track No. 9 at that place?
"A. Right where I was hurt it was right at the marshy places.
"Q. What was the condition of the cross ties at that place?
"A. They were rotten, some of them broken in t-o.
See Ev. D. E. Crockett, Tr., p. 24.

"Q. Are you suffering with a cough?
"A. Yes sir.
"Q. How long have you been suffering with it?
"A. Something like eighteen months I guess.
"Q. Did you suffer with it before you were hurt?
"A. No sir.
"Q. How soon after you were hurt did it develop?
"A. Four or five or six months.
"Q. Is it continuous?
"A. Yes sir.
"Q. Is it getting better or worse?
226 "A. It is getting worse it seems like.
See Ev. D. E. Crockett, Tr. p. 52.

"Q. Let me see what about that cough. Where is that cough located, in your throat or lungs?

"A. Across here (witness indicating region of lungs).

See Ev. D. E. Crockett, Tr. p. 53.

Dr. C. E. Lones testified that he has been practicing medicine in Knoxville about sixteen years; that he knows D. E. Crockett; that he has examined him on several occasions; that he had a condition going on in the spinal cord from this trouble; that he located the trouble in the small of the back between the ribs and hips; that Crockett is suffering from lung trouble; that his lung trouble is tubercular and serious; and that the lungs are just about under the ribs.

See Ev. Dr. C. E. Lones, Tr. pp. 61, 62, 63.

That a blow in the back is sufficient to be the producing cause of this disease and injuries to the spinal cord develop very slowly.

See Ev. Dr. C. E. Lones, Tr. pp. 65, 66.

That Crockett was not in a condition to do manual labor.

See Ev. Dr. C. E. Lones, Tr. p. 67.

Dr. Walter Luttrell testified in substance that he made an examination of D. E. Crockett and found that he had a chronic condition of the back; that this condition was attributable to some injury of the back occasioned by external violence; that Crockett's condition was incurable.

See Ev. Dr. Luttrell, Tr. p-. 67 to 70 inc.

Jack Yeager, an employé of the appellant company, testified that the engine in question came uncoupled; that it just slipped out; that there were low joints in the track; that running over low joints would throw the ends of the car up and down.

See Ev. Jack Yeager, Tr. p-. 74 to 76 Inc.

227 John Godfrey, an employé of the Southern Railway Company, testified in substance that he was acquainted with Track No. 9; that the track where it was loose underneath dropped up and down; that there was a marshy place on track No. 9; that an engine going over it would dip up and down; that the knuckles on the drawbar, if they fit perfectly, have a nine inch grip.

See Ev. John Godfrey, Tr. p-. 78 to 80 inclusive.

W. C. Henderson testified that track No. 9 had some low joints in it; that the knuckles in the drawbars were from eight to ten inches high.

See Ev. W. C. Henderson, Tr. p. 87.

Fred Simpson, an employé of appellant company, was summoned to bring with him all the engineer's reports for engine No. 649 for each day and night for October, 1910,—sixty-three in number,—and produced them not.

See Transcript, pp. 89, 93, and 94.

And thus it will be seen, from the evidence above quoted and the admissions contained in appellant's brief, that there was, to say the least, ample evidence to warrant the Court in submitting this case to the jury and in overruling appellant's motion for peremptory instruction,—especially since the knuckles in the drawbars have a grip of from eight to ten inches, whereas, under the Safety Appliance Act, the maximum variation from the standard height allowed between the drawbars of empty and loaded cars is three inches only.

See Thornton, p. 146, sec. 111.

If, when unloaded, its drawbars are at a greater or less height than prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permits, the car does not comply with the requirements of the law. The law provides that no cars, either loaded or unloaded, shall be used in
228 interstate traffic which do not comply with the standard.

There is no escape from the meaning of these words. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibition of the law and there arises from that violation the liability to make compensation to one who is injured by it.

St. Louis, Iron Mtn. & So. Ry. Co. vs. Mary Taylor, 210 U. S. Rep. 281.

"Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, road beds, works, boats, wharves, or other equipment."

Employers' Liability Act, Sec. 2.

And thus it will be seen that the negligence or defects complained of need not be the proximate cause of the injury, and that if the injury results in whole or in part from such negligence or defects, the carrier is liable, and, as already recited, appellant concedes that the proof tends to show that the drawbar of the engine was too low; that the track was in bad condition; that these defective conditions allowed the engine to be detached from the cars, which, as a result thereof, ran down the track with such force as to cause a collision with other cars standing on the track,—thereby injuring the defendant in error,—and that appellant insists that D. E. Crockett was perfectly well informed of the defective condition of the engine and of the track,—so, that, it would seem, appellant's brief likewise concedes that the defective condition of the engine and track was the proximate cause of the injuries complained of.

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III.

By reading into this assignment of error appellant's admissions above referred to, together with portions of Sections 2 and 3 of the Employers' Liability Act, to-wit:

"That all actions hereafter brought against any common carrier by railroad, to recover damages for personal injuries to an employé, (resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carriers, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, road beds, works, boats, wharves, or other equipment) the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; providing, however, that no such employé who may be injured shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury of such employé."

Employers' Liability Act, Sec. 2 & 3.

appellant's theory of the law applicable to this case is refuted.

IV.

It is next insisted by appellant that D. E. Crockett assumed the risk incident to the defective condition of the engine and of the track. However, Section 4 of the Employers' Liability Act, which is as follows:

"That in any action brought against a common carrier,
230 under or by virtue of any of the provisions of this act, to recover damages for injuries to any of its employés, such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury of such employé":

See Thornton, p. 245.

and Section 8 of the Safety Appliance Act, which reads thus:

"That any employé of any such carrier, who may be injured by any locomotive, car, or train in use contrary to the provisions of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train has been brought to his knowledge":

See Thornton, p. 266.

together with the amendment to said Safety Appliance Act, which reads in part as follows:

"That the provisions and requirements of the Act (entitled an act to promote the safety of employés and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip

their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes* (shall be held to apply to common carriers by railroad,* and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type, and the provisions and requirements thereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains,
231 locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce,* and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith,—excepting only those exempted by Section 6 of said original Act"—

Thornton, page 267.

refutes appellant's theory that D. E. Crockett assumed said risk, and does away with appellant's theory that an interstate carrier may with impunity maim employés now as before, so long as the defects occasioning it are in the engines drawing the cars instead of the cars to which the engine is attached.

Cars used in moving intrastate traffic, on a railway which is a highway of interstate commerce, are comprehended by the provisions of the Safety Appliance Act, declaring, among other things, that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vheicles used on any railroad engaged in interstate commerce,* and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, and for these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce."

So. Ry. Co. vs. U. S., 56 U. S. Rep., (Law. Ed.) p. 76 (1911).
Thornton, pp. 181, 182, 183, Sec. 136.

If not equipped as the act of Congress requires, "the plaintiff did not assume the risk therefrom, even though he continued in the employment of the Company after such unlawful use of the cars had come to his knowledge."

See Thornton, page 227, Section 169.

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V.

It is therefore respectfully insisted that appellant's assignments of error, by reason of their failure to conform to the rule announced in Railroad vs. Johnson, 114 Tennessee, 636, present no reviewable question to this Court; that the action of the trial judge, wherein assailed by said assignments of error, is manifestly correct; and that said judgment should be affirmed, with interest and with costs.

Respectfully submitted,

A. C. GRIM,
Attorney for Appellee.

232 Filed Aug. 28, 1913.

SOUTHERN RAILWAY CO.
vs.
D. E. CROCKETT.

From Knox.

Opinion.

Filed Aug. 28, 1913. S. E. Cleage, Clerk.

Defendant in error, D. E. Crockett, brought this suit in the Circuit Court of Knox County to recover damages for personal injuries sustained by him while in the service of plaintiff in error, Southern Railway Company. He seeks to recover under and by virtue of the Federal Employers' Liability Act passed in 1908; and that both he and plaintiff in error were engaged in interstate commerce at the time of the matters resulting in the injury for which he seeks to recover is not questioned, nor is it questioned that his right to recover, if he has any, is found in the federal statutes referred to, considered in connection with other federal statutes.

Mr. Crockett had been in the service of plaintiff in error at the Coster Yards of the Southern Railway Co. at Knoxville as switchman since May, 1906, when, on October 15, 1910, while still so engaged, he received the injuries complained of. On the last named date, while engaged in making up a freight train, an engine with a freight car attached was being moved down grade towards where some other freight cars were standing on the track, when the car which was attached to the engine became detached or uncoupled, and being propelled by gravity on toward the other cars standing on the track, it came in contact with them; and Crockett, being on the car which became uncoupled, was by the impact, as he claims, thrown against the brake and injured. That he was at his post of duty on the car is not disputed. He insists, and offered evidence tending to show, that the car was caused to become detached from the engine by a defective track at that point, and an insufficient
233 drawbar on the engine. He testified, and offered other testimony tending to show, that the ground on which the track was laid at the point where the car became detached was wet and marshy and the ties were broken and insufficient, so that the track was uneven and rough, and as a result the car and engine attached to it were made to alternately go up and down at the ends where they were coupled together as they passed over the defective track; and tending to further show that the drawbar on the engine which was used in coupling the car to the engine was not over two and one half feet, or thirty inches high measured from the center of the track to the center of the knuckle of the drawbar, and that because of these conditions operating together the car was caused to become detached. On the other hand there was evidence offered by plaintiff in error tending to show that neither of these defects existed, but that both

the track at the point in question and the drawbar on the engine were in proper condition. Of course the questions of fact were for the jury, and they having been by it resolved in favor of plaintiff below, this court is precluded from examining into the evidence bearing thereon; and it is not insisted otherwise.

Plaintiff in error insists, however, that, notwithstanding the finding of the jury in favor of defendant in error on the questions of fact just set out, he is precluded from recovering because of his assumption of the risk; and the refusal of the trial court to direct a verdict in plaintiff in error's favor on the ground that it was admitted by Mr. Crockett that he knew of the defects of which he complains and therefore assumed the risk is assigned as error. The refusal of the trial court to give in charge to the jury a special request in the following terms is also assigned as error: "If the jury should find from the evidence that the drawbar of the engine was defective by being too low or the track defective and that this caused
234 the engine to become detached from the cars, and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and, plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges that under those facts the plaintiff could not recover and your verdict should be in favor of the defendant."

As a basis of fact for the contention that Mr. Crockett knew of the condition of the track and of the drawbar on the engine, it can be said that he admitted that he knew of these conditions, and knew further that cars had been coming detached from the engine, and yet remained in the service.

To meet this situation and the contention of plaintiff in error based thereon it is insisted by counsel for Mr. Crockett that by virtue of the Federal Employers' Liability Act, under which he prosecutes his suit, an assumption of a risk growing out of a failure to comply with the Federal Safety Appliance Act which regulates the height of such drawbars will not bar a recovery. For the consideration of these opposing contentions it is necessary to set out certain portions of the statutes referred to.

The Federal Employers' Liability Act, passed in 1908, by sections three and four, provides as follows:

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where said injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common
235 carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of the employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

See Judson on Interstate Commerce, (2nd Ed.), pages 614 to 616, where the act is set out in full.

The Federal Safety Appliance Act, passed in 1893, referring to common carriers by railroad engaged in interstate commerce, contains the following:

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

"SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper.

236 "SEC. 8. That any employé of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

This act will be found set out in full in Thornton's Federal Employers' Liability and Safety Appliance Acts, (-nd Ed.) pages 452 to 452.

In 1903 this Safety Appliance Act was amended, and the first section of this amendatory act provides that the original act as amended in April, 1896," shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith."

See Judson (2nd Ed.) page 607 for this amendment.

In April, 1910, the Safety Appliance Act was further amended in some respects, and in section 3 of that amendatory act, referring to the Interstate Commerce Commission, it is provided as follows:

"Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic,
237 which does not comply with the standard so prescribed by the commission." Thornton, (2nd Ed.), page 458.

By virtue of this amendatory statute the Interstate Commerce Commission by order dated Oct. 10, 1910, provided as follows:

"The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches." Thornton, (2nd Ed.) Page 461.

So it is seen that by section 3 of the original Employers' Liability Act of 1908 it is expressly provided that no employee who has been injured or killed while engaged in the service regulated by that act "shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death;" and that by section 4 "such employee shall not be held to have assumed the risks of his employment in any case where the violation *of* such common carrier of any statute enacted for the safety of employees contributed to the injury or death." So it appears, and cannot be questioned, that if defendant in error was guilty of contributory negligence only his right of recovery would not be defeated but only abated as provided, and likewise, if it can be said that he assumed the risk his right of recovery would not be defeated, provided the violation of any statute enacted for the safety of employees contributed to his injuries; and it is insisted by his counsel that the violation of the Safety Appliance Act did contribute to his injuries. Counsel for the railway company contends just to the contrary, however, saying that no violation of the Safety Appliance Act contributed to his injury. This last stated contention is based on the proposition that the Safety Appliance Act with its amendment of 1910 just pointed out, and the order of the Interstate Com-
238 merce Commission promulgated pursuant thereto, do not regulate the height of drawbars on engines, but only on cars; and this brings us to the precise question at issue.

By referring to that part of the fifth section of the Safety Appliance Act hereinbefore copied it is seen that it applies to and regulates the standard height of drawbars for "freight cars," and likewise that the order of the Interstate Commerce Commission in like manner applies to the height of drawbars for "freight cars;" and, it

is clear, a strict construction of these terms might well so limit them as to exclude locomotives, but by reference to that portion of the amendment of the Safety Appliance Act passed in 1910, hereinbefore copied, it will be seen that the Interstate Commerce Commission is there given authority to modify or change the standard of heights on drawbars and to fix a time within which such modification or change shall become effective, and that prior to the time so fixed it is declared that "it shall be unlawful to use any car or vehicle," etc., which does not comply with the standard so prescribed. And again it is provided in the same connection that "after the time so fixed it should be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard prescribed by the commission." The very use of the terms car or vehicle would indicate that more than the car is meant to be included. But this is not all, nor even the most forceful or convincing provision of the Safety Appliance Act. By reference to that part of the amendatory act passed in 1903 it is provided that the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad," &c. Here is the express direction that the act regulating the height of drawbars "shall be held" to apply to locomotives.

In Schlemner vs. Buffalo, &c., Railway Co., 205 U. S., 1,
239 10; 51 Lawyers' Edition, 681, 685, it was pointed out by the Supreme Court of the United States that this provision indicated the intention of the original act. This being true how can this court hold that the drawbar on the locomotive in question is not included in and its height controlled by the Safety Appliance Act and its amendments and the orders of the Interstate Commerce Commission pursuant thereto?

Further in the construction of the Safety Appliance Act, it will be observed that by section two thereof it is made unlawful for any common carrier engaged in interstate commerce to which the act applies "to haul or permit to be hauled or used on its line any car used in interstate traffic not equipped with couplers," etc. Here is the use of the word "cars" alone rather than the term "freight cars" as found in the fifth section and the order of the Interstate Commerce Commission hereinbefore set out. In the case of Johnson vs. Southern Pacific Co., 196 U. S., 1, 49 Law. Ed., 363, it was contended by counsel for the Southern Pacific Co. that this section did not apply to locomotives, but the Supreme Court of the United States, overruling the Circuit Court of Appeals for the Eighth Circuit, and establishing a holding contrary to a number of our other courts, held that the word "cars" used in the second section of the act included locomotives. It was pointed out in the Johnson case that the purpose of the act was to include locomotives as well as what is more commonly designated cars, and that for that reason locomotives were included; the court there saying: "Now it was as necessary for the safety of employees in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, as Judge Thayer suggests, since engines have occasion to make couplings more frequently. And manifestly the word 'car' was used in its

generic sense. There is nothing to indicate that any particular kind of car was meant."

And in Schlemmer vs. Buffalo, Etc., Ry. Co., supra, it was held by the Supreme Court of the United States that a shovel car,
240 or what is designated in the dissenting opinion of Justice Brewer, a steam shovel, was a car within the meaning of the second section of the Safety Appliance Act, the majority opinion in that case pointing out that the amendatory statute of 1903 indicated the extent of the original act as hereinbefore observed.

Now if a locomotive is a car within the meaning of the second section of the Safety Appliance Act, we see no reason why a freight engine, or locomotive used in propelling freight cars, might not, for the same reason that prompted that holding, be held to be included in the term freight car; and, in the light of the aemndment of 1903, the original act declaring that the provisions of the act regulating the height of drawbars "shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce," we think it can hardly be questioned that a locomotive drawing freight is included in the term freight cars. Having reached this conclusion it inevitably follows that the assignments of error are not well made, and there being no complaint at the amount of the verdict and judgment, $1,000.00, the judgment of the lower court is affirmed, with costs.

HUGHES, *Judge.*

241 *Judgment of the Court of Civil Appeals.*

Entered August 28, 1913. Affirmed.

SOUTHERN RAILWAY COMPANY
vs.
D. E. CROCKETT.

This case came on to be heard on the transcript of the record from the Circuit Court of Knox County, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion that there is no reversible error in the judgment of the Circuit Court and for the reasons stated in the written opinion of the Court filed and made a part of the record in this case, the assignments of error are all overruled and the judgment of the Circuit Court in all things affirmed.

It is accordingly ordered and adjudged by the Court that the defendant in error have and recover of the plaintiff in error the sume of One Thousand Dollars ($1,000), and the cost of the case; and that he also have and recover of the plaintiff in error and Jourolmon, Welcker & Smith its sureties on its appeal bond the further sum of Fifty-two Dollars damages, said amount being the interest on the above recovery from the date of the judgment in the Court below, to-wit, October 16, 1912, to this date August 28, 1913, together with all the cost of the appeal, for all of which execution is awarded.

On motion of A. C. Grimm, attorney for defendant in error a lien

on the above recovery for his reasonable attorney fee is hereby declared and allowed.

J. T. J.—J.

242 STATE OF TENNESSEE:

Supreme Court at Knoxville.

To S. E. Cleage, Clerk of the Court of Civil Appeals, at Knoxville:

Whereas, in the case of Southern Railway Company plaintiff in error, vs. D. E. Crockett, defendant, said Court of Civil Appeals rendered a Judgment on the 28th day of August 1913, in favor of the Defendant in error, and against the plaintiff in error, and the plaintiff in error has obtained a fiat for the writ of Certiorari to bring said cause in the Supreme Court at Knoxville to be re-tried.

Now therefore, you are hereby commanded to send the transcript of the record and all other papers in said cause, duly enclosed and certified *by* by you to the Supreme Court to be held at Knoxville on the second Monday in September 1913, to the end that such further proceedings may be had thereon, as to the Court may seem reasonable and proper.

Witness, my hand this 2d day of October 1913.

(S.) S. E. CLEAGE,

Clerk Supreme Court of Tennessee, at Knoxville.

243 STATE OF TENNESSEE:

To the Sheriff of Knox County, Greeting:

Whereas, it has been represented to us by the petition of Southern Railway Company that D. E. Crockett obtained a judgment against it in the Court of Civil Appeals from on the 28th day of August 1913, for $1,000.00 and interest and cost, and that said judgment is erroneous and unjust: And furthermore, that execution has issued, or is likely to issue to enforce the collection of the same; and the aforesaid Southern Railway Company, having obtained an order from his Honor M. M. Neil, Chief Justice of the Supreme Court of said State, for a supersedeas to issue in said case;

These are, therefore, to command you, the Sheriff aforesaid, that if you have the property of the said Southern Railway Company already levied upon, by virtue of said judgment and execution, forthwith to restore the same to the said Southern Railway Company at your peril; and you will also notify said d-fendant that he is superseded from further proceeding with said judgment and execution until the further order of this Court. And how you shall have executed this process, you will make known to this Honorable Court at the Court House in Knoxville, at the present term of this Court.

Witness, S. E. Cleage, Clerk of our said Court, at Office in Knoxville, the second Monday in September, Anno Domini, 1913.

(S.) S. E. CLEAGE, *Clerk,*

(S.) JAS. T. JOY,

Deputy Clerk.

244 Filed Oct. 3, 1913. S. E. Cleage, Clerk.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

Petition of the Southern Railway for Certiorari and Supersedeas.

To the Honorable Supreme Court of Tennessee, sitting at Knoxville:

The petitioner, Southern Railway Company, respectfully shows to the court that it is greatly aggrieved and prejudiced by the judgment pronounced by the court of Civil Appeals on the 28th of August, 1913, in the case above styled, which was appealed to that court by the petitioner, from a judgment pronounced by the Circuit Court of Knox County, Tennessee.

Substance of the Case.

The case was an action for personal injuries in which there was a verdict and judgment in favor of the defendant in error for $1,000.00.

The declaration filed in the Circuit Court alleges that the plaintiff was injured while employed by the Southern Railway Company as a switchman, the immediate cause of the accident being that a switch engine which was moving cars in the yards at the time, became detached from the cars and allowed them — run into other cars, thereby producing a jolt or jar which threw him down on the car and injured him.

The declaration stated the cause of action in three counts, the only material difference in the counts being that in one, the right to recover was based upon the Federal Employers' Liability Act, it being alleged that the Railway Company was an interstate carrier by railroad, and the plaintiff was in its employment and engaged at the time in the movement of interstate commerce.

The declaration averred all kinds of defects and deficiencies in the cars and in the track, also the negligence of fellow servants. (Tr. pp. 2-7.) But the only negligence which the proof tended to show, was that the draw bar of the engine was too low and the track in bad condition. (See plaintiff's evidence, Tr. pp. 16-24, 40-48. Also see Opinion p. 1.) These defective conditions, it was alleged, allowed the engine to become detached from the cars and the cars to collide with other cars standing on the same track.

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While the overwhelming weight of the evidence introduced upon the trial of the case in the Circuit Court showed that these particular defects did not exist and had nothing to do with the injuries complained of, petitioner conceded, upon appeal in the Court of Civil Appeals, that there was evidence tending to show the existence of these defective conditions, but it was denied that there was any evi-

dence tending to show that said defective conditions proximately contributed to produce plaintiff's injury.

The Court of Civil Appeals, as the basis of its opinion, found the facts connected with the accident to be:

"Mr. Crockett had been in the service of plaintiff in error at the Coster Yards of the Southern Railway Company at Knoxville as switchman since May 1906, when, on October 15, 1910, while still so engaged, he received the injuries complained of. On the last named date, while engaged in making up a freight train, an engine with a freight car attached was being moved down grade towards where some other freight cars were standing on the track, when the car which was attached to the engine became detached or uncoupled, and being propelled by gravity on toward the other cars standing on the track, it came in contact with them; and Crockett, being on the car which became uncoupled, was by the impact, as he claims, thrown against the brake and injured. That he was at his post of duty on the car is not disputed. He insists, and offered evidence tending to show, that the car was caused to become detached from the engine by a defective track at that point, and an insufficient draw bar on the engine. He testified, and offered other testimony tending to show, that the ground on which the track was laid at the point where the car became detached was wet and marshy and the ties were broken and insufficient, so that the track was uneven and rough, and as a result the car and engine attached to it were made to alternately go up and down at the ends where they were coupled together as they passed over the defective track; and tending to further show that the draw bar on the engine which was used in coupling the car to the engine was not over two and one half feet, or thirty inches high measured from the center of the track to the center of the knuckle of the draw bar, and that because of
246 these conditions operating together the car was caused to become detached. On the other hand there was evidence offered by plaintiff in error tending to show that neither of these defects existed, but that both the track at the point in question and the draw bar on the engine were in proper condition. Of course the questions of fact were for the jury, and they having been by it resolved in favor of plaintiff below this court is precluded from examining into the evidence bearing thereon; and it is not insisted otherwise." (See Opinion pp. 1 and 2.)

The evidence in the Circuit Court conclusively showed, and the Court of Civil Appeals so found, that Mr. Crockett knew of the defective condition of the track and the drawbar of the engine before he engaged in the service in which he was injured. He admitted in the evidence that he knew these conditions, and knew further that the cars had been becoming detached from the engine, and yet he remained in the service. (Tr. pp. 22, 48, 162, and 163.) See Opinion, pp. 2 & 3. Undoubtedly there was evidence tending to establish this proposition of fact.

Based upon this established fact, the petitioner complained by assignments of error in the Court of Civil Appeals,

(1) That the Circuit judge should have sustained the motion

made by it for peremptory instructions to the jury, for the reason that Crockett knew of the existence of the defects complained of before and at the time he went to work with these defective appliances, and fully appreciated the dangers to him incident thereto, and therefore he assumed the risk incident to his service with the defective instrumentalities.

(2) If the proof did not show conclusively that he knew of these defects and appreciated the danger incident thereto, there was proof tending to show his knowledge thereof, and that therefore, the trial judge should have given to the jury in its charge a request submitted by the petitioner as follows:

"If the jury should find from the evidence that the drawbar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still, if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and plaintiff knew before he went to work, that the defects existed at that time, and that by reason
247 thereof the engine had been accustomed to become uncoupled, and that he appreciated the danger, then the court charges that under those facts the plaintiff could not recover, and your verdict should be in favor of the defendant" (See Tr. p. 174, Assignments of Error pp. 4 and 5.)

The Court of Civil Appeals overruled and disallowed the petitioner's assignments of error upon the ground that the defective condition of the drawbar was in violation of the Federal Safety Appliance Acts, and therefore, under the Federal Employers' Liability Act, Crockett did not assume the risk of injuries which he sustained partly as the result of the failure of the railroad company to have the drawbar of the engine up to the standard height required by the Interstate Commerce Commission for the drawbars of freight cars. The Court of Civil Appeals holds that a switch engine is a freight car within the meaning of the Federal statute which required railroad companies to maintain the drawbars of their freight cars at a standard height to be fixed by the Interstate Commerce Commission.

Petitioner respectfully shows to the court that the Court of Civil Appeals was in error in so holding. The Federal Employers' Liability Act does not abolish the common law doctrine of assumption of risk except where the injury results from the violation of some other statute passed for the safety of employés. Neither the Safety Appliance Acts nor any other act for the safety of employés engaged in interstate railway service requires railway companies to maintain on its switch engines, drawbars of the standard height fixed by law for freight cars, nor to maintain drawbars on its switch engines at any standard height.

Had the Court of Civil Appeals decided in accordance with the foregoing contentions of the petitioner, which were properly raised and presented in that court, the judgment would have been in favor of the petitioner.

Therefore, petitioner avers that it is prejudiced by the said judgment of the Court of Civil Appeals.

In consideration of the premises, the petitioner prays that
248 it be granted a writ of certiorari to the end that the record in said cause may be certified to the Supreme Court and a review of the judgment of the Court of Civil Appeals had, and that the same be corrected and reversed. The petitioner also prays for a writ of supersedeas to stay the collection of said judgment pending the review thereof by the Supreme Court upon this petition.

Petitioner presents herewith to the court the transcript of the record filed in the Court of Civil Appeals, together with the judgment and opinion of that court, and also submits herewith its assignments of error and brief in support of this petition.

L. D. SMITH.
SOUTHERN RAILWAY COMPANY,
By ATTORNEY.

STATE OF TENNESSEE,
County of Knox, ss:

Personally appeared before me, the undersigned authority, L. D. Smith, who makes oath that he is attorney for the petitioner in the above cause, and that the facts set forth therein are true to the best of his knowledge, information and belief.

L. D. SMITH.

Subscribed and sworn to before me this 2 day of October, 1913.
J. M. MEEK, [SEAL.]
Notary Public.

249 Filed Oct. 3, 1913. S. E. Cleage, Clk.

In the Supreme Court of Tennessee, at Knoxville, September Term, 1913.

Knox County. Law.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

Certiorari.

Assignment of Errors and Brief by Southern Railway Company, Plaintiff in Error.

I.

The ultimate question presented on the petition for certiorari in this case is, Did the safety appliance acts of Congress require of interstate railway companies the maintenance of drawbars on its switch engines of the minimum height of thirty-one and a half inches?

The question arises in this case in this matter:

The defendant in error, D. E. Crockett, brought this suit in the Circuit Court of Knox County to recover damages for personal injuries alleged to have been sustained, by him while he was employed by the plaintiff in error, Southern Railway Company, as a switchman in its yards, on October 15, 1910. He recovered a verdict and judgment in the Circuit Court for $1,000.00.

The declaration stated the plaintiff's cause of action in three counts, the only material difference in the three counts being that in one of them his right to recovery was based upon the Federal Employers' Liability Act, it being alleged that the Railway Company was an interstate carrier by railroad, and the plaintiff was in its employment and engaged at the time he was injured, in the movement of intetstate commerce.

While the declaration alleged various kinds of defects and
250 deficiencies in the cars and in the track, the only negligence which the proof tended to show was that the drawbar of the engine was too low, and the track in bad condition. (Tr. pp. 16-24, 40-48.)

The facts immediately connected with the accident are found by the Court of Civil Appeals to be as follows:

"Mr. Crockett had been in the service of plaintiff in error at the Coster Yards of the Southern Railway Company at Knoxville as switchman since May, 1906, when, on October 15, 1910, while still so engaged, he received the injuries complained of. On the last named date, while engaged in making up a freight train, an engine with a freight car attached was being moved down grade towards where some other freight cars were standing on the track, when the car which was attached to the engine became detached or uncoupled, and being propelled by gravity on toward the other cars standing on the track, it came in contact with them; and Crockett, being on the car which became uncoupled, was by the impact, as he claims, thrown against the brake and injured. That he was at his post of duty on the car is not disputed. He insists, and offered evidence tending to show, that the car was caused to become detached from the engine by a defective track at that point, and an insufficient drawbar on the engine. He testified, and offered other testimony tending to show, that the ground on which the track was laid at the point where the car became detached was wet and marshy and the ties were broken and insufficient, so that the track was uneven and rough, and as a result the car and engine attached to it were made to alternately go up and down at the ends where they were coupled together as they passed over the defective track; and tending to further show that the drawbar on the engine which was used in coupling the car to the engine was not over two and one-half feet, or thirty inches high measured from the center of the track to the center of the knuckle of the drawbar, and that because of these conditions operating together the car was caused to become detached. On the other hand there was evidence offered by plaintiff in error tending to show that neither of these defects existed, but that both the track at the point in question and the drawbar on the engine were in proper condition. Of course the questions of fact were for the jury, and they having been by it resolved in favor of plaintiff below,

this court is precluded from examining into the evidence bearing thereon; and it is not insisted otherwise." (See Opinion pp. 1 and 2.)

The evidence in the Circuit Court conclusively showed, and the Court of Civil Appeals so found, that Mr. Crockett knew of the defective condition of the track and of the drawbar of the engine before he engaged in the service in which he was injured. He admitted in his testimony that he knew these conditions, and that the cars had been becoming detached from the engine prior to the accident. (Tr. pp. 22-48, 162 and 163. See also Opinion Court of Civil Appeals pp. 2 and 3.)

251 The Court of Civil Appeals overruled and disallowed the petitioner's assignments of error upon the ground that the proof tended to show that the drawbar of the switch engine that was being used in the movement of these cars at the time Crockett was injured, was less than thirty-one and one half inches high, measured from the top of the rail to the center of the drawbar, and that the Federal Safety Appliance Acts at that time required the railway company to have the drawbars on its switch engines not less than thirty-one and one-half inches in height, and therefore under the Federal Employers' Liability Act, Crockett did not assume the risks incident to the defective condition of the drawbar, although he knew of this defective condition, the Employers' Liability Act providing on its face that in an action brought against any common carrier under the provisions of the acts for injuries to any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury of such employee. (See Opinion Court of Appeals, pp. 3-5.)

II.

Assignments of Error.

1. The Court of Civil Appeals was in error in holding that the Federal Safety Appliances statute, at the time of the injury complained of, October 15, 1910, prohibited the railway company from using a switch engine with the drawbars less than thirty-one and one-half inches in height, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, and therefore in holding that the defendant in error did not assume the risks incident to the defective conditions which he knew to exist, as there was no dispute in the evidence that he did know of these defects and fully appreciated the danger incident to service in connec-
252 tion therewith the suit of the defendant in error should have been dismissed, plaintiff in error having in the court below made a motion for peremptory instructions based upon this ground.

The safety appliance acts authorized the Interstate Commerce Commission to designate the standard height of drawbars for "freight cars;" it did not itself fix any standard, nor authorize the Interstate Commerce Commission to fix any standard for the height of drawbars on switch engines.

III.

Brief and Argument.

The question presented is, Did the Safety Appliance Acts in force at the time of the injury involved in this case, require of railroad companies the duty of having the drawbars on switch engines at a minimum height of thirty-one and one-half inches above the level of the tops of the rails?

An examinaion of the statutes themselves is necessary for a correct determination of this question.

The first Safety Appliance Act passed by Congress was approved March 2, 1893. It was amended April 1, 1896.

By Section 5 of that Act it is provided that within ninety days after passage of the act, the American Railway Association is authorized to designate to the Interstate Commerce Commission the standard height of drawbars for "freight cars." If the American Railway Association failed to determine this standard, then it was made the duty of the Interstate Commerce Commission to do so.

Whether the American Railway Association acted upon the authority given to it by Congress, or whether the Interstate Commerce Commission acted upon its authority under the act of 1893, does not appear in this case. No evidence was introduced showing what action, if any, the Interstate Commerce Commission took with respect to fixing a standard for the height of drawbars on freight cars.

The only method by which the court can determine whether
253 the Interstate Commerce Commission took any action, and what action was taken, if any, is by taking judicial notice of the proceedings of that body.

While we shall deny that this court can take judicial notice of the action of the Interstate Commerce Commission in pursuance of the authority given it by Congress, we shall for the present assume that the court may do so, and for the present discuss the question from that stand point.

Our information is that on June 6, 1893, the American Railway Association, pursuant to the provisions of Section 5 of the Safety Appliance Act, adopted and certified to the Interstate Commerce Commission, a resolution providing that the standard height of drawbars for freight cars, measured perpendicularly from the level of the tops of the rails to the center of the drawbars for standard gauge railroads, should be thirty-four and one-half inches and the maximum variation from such standard heights between the drawbars of empty and loaded cars, should be three inches.

Thus the law stood until April 14, 1910, at which time Congress passed another act relating to safety appliances. This act after providing that all cars should be equipped with secure sill steps, efficient hand brakes, secure ladders, and running boards, hand holds, grab irons, etc., provided by Sec. 3 that the Interstate Commerce Commission should have authority to modify or change and to prescribe the standard height of drawbars, and to fix the time within which such modification or change should become obligatory.

It does not appear in this record whether the Interstate Commerce

Commission ever took any action by the authority given it by the Act of 1910, or if so, what action it did take, and we shall contend that this court cannot take judicial notice of the action taken by the Interstate Commerce Commission in this respect. But waiving that question for the present, we are informed that on
254 & 255 the 10th day of October, 1910, the Interstate Commerce Commission ordered that the standard height of drawbars theretofore designated, in compliance with law should be modified in the manner following:

"The maximum height of drawbars for freight cars, measured perpendicularly from the level of the top of the rails to the center of the drawbars for standard *guage* railroads in the United States, subject to said Act, shall be thirty-four and one-half inches, and the minimum height of drawbars for freight cars on such standard *guage* railroads, measured in the same manner, shall be thirty-one and one-half inches."

It will be seen by examination of the opinion of the Court of Civil Appeals, that that court took it for granted that this order of the Interstate Commerce Commission made October 10, 1910, was in force at the time Crockett was injured, October 15, 1910. But the fact is, as we are informed, this order of the Interstate Commerce Commission further provided that the standard prescribed in the order should not become effective and obligatory until December 31, 1910.

Therefore, as the standard height of drawbars was not fixed by the Act of Congress in the Act itself, but merely authorised the Interstate Commerce Commission to establish the standard, to fix the time when such standard should become obligatory, and that time having been fixed at December 31, 1910, we cannot look to the Act of 1910 nor be governed by its provisions in determining the question at issue in this case, the injuries complained of having been sustained on the 15th of October, 1910.

So that we must look to the Act of 1893 as amended in 1896, and the order of the Interstate Commerce Commission based upon that Act, to ascertain whether or not any of its provisions with respect to the height of drawbars, applied to switch engines.

It is absolutely certain that the Act of 1893 makes no reference whatever to the standard height of drawbars for switch engines. Its language is directed specifically at freight cars. Is a switch engine a freight car within the meaning of this statute?
256 Before undertaking to show what we conceive to be the manifest error in the reasoning of the Court of Civil Appeals in reaching the conclusion that a switch engine was a freight car, it may be well for the convenience of the court to quote in full the Safety Appliance Act of 1893 as amended by the Act of 1896.

Safety Appliance Acts.

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in

interstate commerce by railroad to use on its line any locomotive-engine in movong interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of Section one of this act, it may lawfully refuse to receive from connecting lines of road or shipper any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several guages of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Com-
257 mission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this

act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge, Provided, That nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended April 1, 1896, 29 U. S. Stat. at L., 85, ch. 87.)

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employé of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

Approved, March 2, 1893, 27 U. S. Stat. at Large, 531, ch. 196.

We gather from the opinion of the Supreme Court of the United States in the case of St. Louis, etc., Railway Company vs. Taylor, 210 U. S., 281, that the American Railway Association, pursuant to the provisions of section 5 of the act of 1893, on June 6, 1893, adopted and certified to the Interstate Commerce Commission the following resolution:

(1) "Resolved, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for standard *guage* railroads
258 in the United States, shall be thirty-four*e* and one-half inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be three inches."

(2) Resolved, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for the narrow *guage* railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches."

Thornton, 147.

Reading this statute in connection with the resolution of the American Railway Association, it is scarcely possible that provisions of the act relating to the height of drawbars could be made to apply to switch engines. Indeed, the Court of Civil Appeals concedes as much and finds it necessary, in order to reach its conclusions, to resort to other acts and provisions relating to safety appliances.

The view taken by the Court of Civil Appeals, which is the strongest that can be urged in favor of their position, may best be stated in the language of the opinion delivered by Justice Hughes:

By referring to that part of the fifth section of the Safety Appliance Act hereinbefore copied it is seen that it applies to and regulates the standard height of drawbars for "freight cars," and likewise that the order of the Interstate Commerce Commission in like manner applies to the height of drawbars for "freight cars"; and, it is clear, a strict construction of these terms might well so limit them as to exclude locomotives, but by reference to that portion of the amendment of the Safety Appliance Act passed in 1910, hereinbefore copied, it will be seen that the Interstate Commerce Commission is there given authority to modify or change the standard of heights on drawbars and to fix a time within which such modification or change shall become effective, and that prior to the time so fixed it is declared that "it shall be unlayful to use any car or vehicle" etc. which does not comply with the standard so prescribed. And again it is provided in the same connection that "after the time so fixed it should be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard prescribed by the commission." The very use of the terms car or vehicle would indicate that more than the car is meant to be included. But this is not all, nor even the most forceful or convincing provision of the Safety Appliance Act. By reference to that part of the amendatory act passed in 1903 it is provided that the height of drawbars shall be held to apply to all trains, locomotives,
259 tenders, cars, and similar vehicles used on any railroad" &c.

Here is the express direction that the act regulating the height of drawbars "shall be held" to apply to locomotives.

(Opinion pp. 6 and 7.)

As said in the opinion of the Court of Civil Appeals, the act of 1893 and the resolution of the American Railway Association in pursuance thereof, only purports to regulate the height of drawbars for freight cars. The term "freight car" is so universally known to describe a particular kind of car that it hardly seems possible to be possible for it to be construed to mean a switch engine. Undoubtedly a freight car is not any kind of a car. For example, it is not a passenger car. It is a particular kind of a car. Webster in his dictionary gives what everybody knows to be a correct definition of a freight car. He says, it is "A railroad car especially designed for holding freight." He defines freight to be "The cargo or any part of the cargo of a ship or railroad car; lading; that which is carried by water or by land; as 'The freight by the company was mostly

wheat'; 'The schooner's freight was coal; a freight train; loaded with passengers and freight."

The Encyclopædia Brittanica, under the title of "Railroads in the United States," in discussing the different kinds of cars used in railway service, divides them into locomotives, passenger cars and freight cars. Of freight cars it is said: "Freight cars of today are from thirty-four to forty feet in length, weigh from 29,000 to 36,000 pounds and carry loads of from 60,000 to 70,000 pounds, the 60,000 pound car being now considered the standard.

"In variety, freight cars are especially adapted to many uses. There are now ventilated refrigerator cars for the transportation of fruits, vegetables, fresh meats and other perishable goods; cattle-cars with arrangements for watering and feeding stock while in transit; single and double deck cars for sheep and hogs; improved box cars for general merchandise; special cars for furniture and other light bulk freight; improved flat-cars for lumber and stone; double and single hopper-bottom cars for coal, crushed stone, etc., and special cars for ores, of which the heavier ones are often lined with iron plates. There are poultry cars, in which birds are fed and watered. Other special cars are caboose-cars, horse-cars, coke-cars, barrel-cars, as well as flat-cars from 60 to 70 feet in length, upon which street cars are shipped. "Enc. Brit. Vol. 28, p. 537."

260 One told to observe a freight car would hardly expect to see a switch engine. Congress is presumed to have used this term in its common acceptance. We might as well say that Congress in requiring that locomotives should be equipped with the power driving wheel brake system, intended the term locomotive to apply to freight cars, as to say that the provisions with respect to the height of drawbars for freight cars applied to locomotives.

That Congress did intend in referring to freight cars to mean the kind of cars which the words described, and which they are commonly accepted to mean, becomes manifest when we consider in connection therewith the further provision found in the same section and following immediately after the language conferring authority on the Interstate Commerce Commission to designate the standard height of draw bars for freight cars, to-wit:

"And shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars,"

Thus showing that the car which was to have a standard height, was a car which would sometimes be empty and sometimes loaded. A freight car is a car upon which freight is loaded for carriage and from which freight is unloaded when it is no longer to be carried. Nobody ever heard of a loaded switch engine, nor an empty switch engine. Switch engines are not used for the purpose of being loaded with freight. A passenger car might be referred to as being empty or loaded. The very construction of a locomotive contradicts the idea that the statute was intended to embrace a switch engine within the meaning of the term "freight car." The drawbar of a freight car is attached to the body of the car which is built up on trucks somewhat like the bed of a wagon, and is on springs. When the car is

loaded the body is pressed downward and thereby the drawbars are brought nearer to the level of the rails, hence the necessity for the provision fixing a variation in the maximum height of empty and loaded cars. Such is not the case with the switch engine. The drawbar is attached to the pilot beam, and its height from the rails remains the same so far as being affected by a load is concerned.

261 The engine is the instrument which carries the power. It is never used for the purpose of carrying freight. To say that a switch engine is a freight car, is to do violence to men's understanding of the meaning of terms.

But let us see whether this sane and common understanding of the term "freight car" can be stretched to include a switch engine by the considerations referred to in the opinion of the Court of Civil Appeals.

It is said that in the opinion of the Supreme Court of the United States in the case of Johnson vs. Railroad Company, 196 U. S., p. 1 (49 L. E. 363), in construing section 2 of the Safety Appliance Act of 1893, a locomotive was held to be a car, and that said section in making it unlawful for a common carrier to haul or use on its line "any car" not equipped with couplers coupling automatically by impact, prohibited the use of locomotives not so equipped.

An examination of the case we think will sufficiently answer the argument on this point. The Supreme Court was dealing with a case which involved the failure of a railroad company to equip its locomotives with couplers coupling automatically by impact. The plaintiff in that case had been injured by reason of having to make a coupling of an engine not so equipped.

In order that the exact words of the section involved in that case may be immediately before the court, we quote it again:

"SEC. 2. That on and after the first day of January, 1893, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of a man going between the ends of the cars."

It is to be noted that this provision embraces "any car" which, of course, means all cars, and the question presented to the Supreme Court was not whether a locomotive was a freight or a passenger car, but whether it was a car at all.

On this point the court said:

"and manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was

262 meant. Tested by context, subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act."

The effort of the counsel for the railway company in that case was to give the term "any car," a restricted meaning. It could not be denied that the words "any car," by their general meaning would

embrace a locomotive, so it was contended that the words could not embrace locomotives because locomotives were elsewhere in terms required to be equipped with power driving wheel brakes, and that the rule, the expression of one thing excludes another, applied. In other words, it was argued that because section 1 of the act required locomotives to be equipped with a certain kind of appliance, section 2, therefore, referred to other kinds of cars than locomotives. But this argument was answered by the fact that it was not only proper for a locomotive to be equipped with a train brake system, but the same reasons applied for equipping locomotives with the safety coupling appliances, and the object of the act being the protection of employees, a narrow construction would not be adopted so as to exclude from the provisions of the act some of the instrumentalities clearly embraced within the meaning of the general terms used. In determining whether the legislature intended a limited and restricted meaning to be applied to the words used, the court could properly look to the general intention and purpose of the act.

But this reasoning does not apply to the provision with respect to the standard height of freight cars, for the reason that Congress used words of restricted and well known meaning. It might be conceded for the sake of the argument, that there was just as much reason for having the drawbars of a locomotive of a standard height as existed for freight cars, but it is the intention of the act that we are to arrive at, and since the Congress has used language which clearly
263 defines the particular kind of a car intended to be embraced by the provisions, there is no occasion for resort to the general need which might exist for the kind of legislation not covered by the manifest meaning of the language used.

This interpretation of the statute becomes more manifest, if possible, when we bear in mind that section 2 of the act which was under construction in the Johnson case, in defining the kind of cars to which the automatic couplers applied, used *used* the general and broad term "any car"; whereas in the same act when the Congress undertakes to fix a standard height for drawbars, it specifies the particular kind of car, using the term "freight cars." By section 1, the kind of a car that was to be equipped with the train brake system was a locomotive. By section 2, the kind of car that was to be equipped with automatic couplers, was "any car," or all cars, whereas by section 5, the kind of car on which the height of drawbars was regulated, was a freight car.

The controlling thought in the opinion in that case is that all the considerations including the object and purpose of the statute, the necessities for the particular appliance, the general meaning of the term, and all went to show that Congress, in using the words "any car" used them in a very broad and generic sense and meant thereby to include all kinds of cars which run on the rails, and therefore necessarily included locomotives.

Another suggestion made by the Court of Civil Appeals in support of this opinion is that by section 2 of the act of 1893, it is made unlawful for any common carrier engaged in interstate commerce "to haul or permit to be hauled or uses on its line any car used in inter-

state traffic not equipped with couplers etc." With respect to this the court says in its opinion:

"Here is the use of the word "cars" alone rather than the term "freight cars" as found in the fifth section, and the order of
264 the Interstate Commerce Commission hereinbefore set out.

It will be seen that in the opinion of the Court of Civil Appeals the words "to haul or permit to be hauled or used on its line, any car used in interstate traffic not equipped with couplers," are between quotation marks. The quotation is taken from the second section of the act of 1893. If the Judge had quoted the balance of the sentence instead of substituting the letters "etc.," it would have instantly occurred to him that that section had no application whatever to the height of drawbars.

We have had occasion heretofore in this brief to quote this section, and it is only necessary here to call attention to the fact that it is made unlawful thereby for any common carrier to haul or use any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. It is true that this section uses the term "any car," but when the quotation is completed, it is seen that the prohibition is against the use of "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It is so manifest that the court in referring to this section of the act overlooked its application alone to coupling appliances, that it has occurred to us that the court may have intended to quote from section 2 of the act of 1910. If so, the quotation when completed is equally unfortunate, for the position sought to be illustrated. Section 2 of the act of 1910 makes it unlawful for a common carrier to haul or use on its line "any car subject to the provisions of this act not equipped with the appliances provided for in this act, to-wit:

265 'all cars must be equipped with secure sill steps and efficient hand-brakes; all cars requiring secure ladders, secure running boards, shall be equipped with such ladders and running boards and all cars having ladders should also be equipped with secure handholds, or grab irons on their roofs at the tops of such ladders.' "

So it will be seen that neither section 2 of the act of 1893 nor section 2 of the act of 1910 has any application whatever to the requirement for a standard height of draw bars, and instead of showing that the provision with respect to the standard height for the draw bars of freight cars is applicable to all kinds of cars, it shows the very reverse, because, in referring to such equipment as automatic couplers, ladders, running boards, etc., the Congress used the generic term *of* "any car", whereas in relation to the height of draw bars it used the restricted term "freight cars", thus making manifest that the Congress intended to make a distinction between freight cars and other kinds of cars.

Another suggestion of the Court of Civil Appeals is, that in the

act of 1910, which is primarily an act for the purpose of requiring all cars to be equipped with secure hand-holds, running boards, etc., at the end of section 3 gives authority to the Interstate Commerce Commission to modify or change and to prescribe the standard height of draw bars, and fix the time within which such modification or change shall become effective and obligatory. But it is the concluding part of that provision to which the Court of Civil Appeals calls attention as having the effect to extend the regulations of the Commission to every kind of car, to-wit:

"and prior to the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed, or the standard so prescribed, and after the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

266 As we have seen heretofore, the Interstate Commerce Commission had made no changes in the regulation with respect to draw bars at the time of the accident involved in this case. The Commission having been given authority to change the previous regulations it was deemed appropriate to provide that it shall be unlawful to use a car that did not comply with the previous regulations. In other words, this provision of the statute does not change or enlarge the scope of the regulations which had previously been made by the Commission. It was not intended to make the previous regulations apply to cars that it did not apply to before. If we assume that the previous regulations with respect to the height of the draw bars did not apply to a switch engine it would not apply to a switch engine under this provision. The whole clause goes right back to the original act of 1893, and the order of the Interstate Commerce Commission issued in pursuance thereof. It is true this prevision makes use of the general term "any car" or "vehicle", but the context shows that the car or vehicle referred to was such car as did not comply with the standard previously prescribed by the Commission, and when we look back to what the Commission had done, we find that it had prescribed a standard for freight cars merely.

This suggestion of the Court of Civil Appeals makes it necessary to view the whole of the act of 1910, and for convenience we quote it in full:

"Ladders, Hand Brakes, Hand Holds.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and *three,* commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions

of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with ap-
267 pliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission, *to be made after full hearing, and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission* shall be subject to a like penalty as failure to comply with any requirement of this Act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have be-

come defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point;
268 and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of draw bars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act.

Approved, April 14, 1910.

In connection with this Act of 1910, it will be convenient for the court to have before it also the order of the Interstate Commerce Commission of October 10, 1910, presumably made in pursuance to the Act of 1910, and to that end we quote also in full:

Order of the Interstate Commerce Commission, October 10, 1910.

In the Matter of the Standard Height of Drawbars.

Whereas, By the third section of an Act of Congress approved April 14, 1910, entitled "An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to pre-
269 scribe the standard height of drawbars, and to fix the time within which such modification or change shall become effective and obligatory; and

Whereas, A hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910;

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said Act.

It is ordered. That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to-wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the center of drawbars for standard *guage* railroads in the United States subject to said Act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard *guage* railrods measured in the same manner shall be 31½ inches, and on narrow *guage* railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow *guage* railroads measured in the same manner shall be 23 inches, and on 2-foot-*guage* railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17½ inches, and the minimum height of drawbars for freight cars on such 2-foot-*guage* railroads measured in the same manner shall be 14½ inches.

And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910.

Having read this act in full let us compare some of its provisions with the interpretation given by the Court of Civil Appeals, remembering that the Court of Civil Appeals takes the view that because the act, in referring to the various equipments required by it and the

Act of 1893, groups the appliances and vehicles to which they are to be applied, and in general terms provides that all the vehicles must be equipped with all the appliances; that, therefore, every car of every kind must be equipped with every kind of appliance referred to in the act. And also bearing in mind our contention that the act only intends to require the application of the particular ap-
270 pliance mentioned by the act for the particular car.

The first section of this act provides that its provisions shall apply to every vehicle subject to the act of March 2, 1893, and to the amendments of 1896 and 1903, commonly known as the "Safety Appliance Acts." This section taken alone would require every car without reference to its kind, which would include locomotives and flat cars, to be equipped with running boards and ladders, whereas, when the second section of the act is examined it will be found that running boards and ladders are to be applied only to cars which require ladders and running boards. So that in order to determine what vehicle any particular appliance is to be equipped with, we must ascertain what particular appliance has been provided for the particular vehicle, and of course if all cars are required to have a particular appliance, then the act requires all cars to have that particular appliance; but if a particular kind of car is required to have only a particular kind of appliance, then this act only requires that all vehicles of that kind shall be equipped with the particular appliance provided by the act for it. To illustrate: The previous act had made it unlawful to use any car not equipped with automatic couplers; the act of 1910 makes that provision apply to all cars whether engaged in interstate service or not, and it makes no difference whether the car is a flat car or locomotive—it must be equipped with the automatic coupler. As the act does not designate ladders and running boards except on such cars as require ladders and running boards, the object of the provision is to have all cars which do require ladders and running boards to be equipped with such ladders and running boards.

Section three authorizes the Interstate Commerce Commission to designate the number, dimensions, location, and manner of
270½ application of the various appliances required by the different safety appliance acts and provides that the standard of equipment prescribed by the Commission shall be used on all cars subject to the provisions of this act. By the interpretation sought to be applied by the Court of Civil Appeals, each and every car would have to be equipped according to the standard prescribed by the Interstate Commerce Commission for every kind of a car. This provision simply means that every car for which the Commission establishes a particular standard of equipment, shall comply with that standard of equipment. It certainly does not mean that a car must have the equipment provided by the Commission for other cars where that equipment is not required for the particular car.

Section five provides that nothing in the act shall be construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from the provisions, powers, duties, liabilities, or requirements of the safety appliance acts. This pro-

vision certainly does not mean to impose upon the Interstate Commerce Commission the duties which the act had imposed upon the common carrier, nor vice versa, to impose upon the common carrier the powers, duties, liabilities, or requirements of the Interstate Commerce Commission or the United States attorney. The rule of interpretation adopted by the Court of Civil Appeals would construe this action as imposing upon the carriers the powers and duties of the Interstate Commerce Commission, and would require the United States attorney to perform the duty imposed upon the common carrier.

These suggestions it seems to us conclusively show that a proper construction will not extend the requirement for appliances to cars not specifically required to have the appliances and that the purpose of the statute is to bring within the purview thereof all cars of all kinds requiring every car of a particular kind to be equipped with the appliances prescribed for the particular kind of a car.

271 The Court of Civil Appeals refers to the amended Act of 1903 as being the most forceful and convincing provision in support of the interpretation given by the court, that a switch engine is a freight car within the meaning of the act relating to the height of drawbars, because of the provision therein to the effect that the acts passed for the promotion of the safety of employees and travelers upon railroads shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroads engaged in interstate commerce, etc.

That the Court of Appeals has misconceived the scope of the Act of 1903 we think will appear clearly upon a study of its various provisions, and to that end we quote the act in full:

272 SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

273 The argument of the Court of Civil Appeals is that because this statute refers specifically to locomotives, tenders, cars and similar vehicles and provides for the application of the various Safety Appliance Acts to all these kinds of cars, that therefore a switch engine is brought within the meaning of the words "freight cars" mentioned in the fifth section of the original Act.

What this Act of 1903 means is this: All of the locomotives used on all railroads engaged in interstate commerce in the Territories and the District of Columbia as well as in the United States, should be equipped with the appliances provided by the original act for locomotives and so with the other classes of cars. All cars of every interstate carrier in the United States, the Territories and the District of Columbia are to be equipped with the appliances required by the act for such cars. All freight cars of all the interstate roads in the United States, in the District of Columbia and in the Territories, shall have a standard height of drawbars. Any other interpretation of this act would require freight cars to be equipped with the appliances required for locomotives.

To illustrate: section one of the Act of 1893 makes it unlawful for an interstate carrier by railroad to use any lomomotive in moving interstate traffic not equipped with the power driving-wheel brake and appliances for operating the train brake system. The construction of the Court of Appeals of the Act of 1903 would require common carriers to equip each and every car whether freight car, passenger car or any other kind of car with the appliances with which a

locomotive is required to be equipped. Section two of the Act of 1893 makes it unlawful for any car to be used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc. This section being applicable to all sorts of cars as respects automatic couplers, the Act of 1903 makes applicable not only to all kinds of cars but to all cars of all kinds, whether used in moving interstate traffic or otherwise, or whether engaged in the
274 Territories or in the District of Columbia or elsewhere. In other words, where the original act made it unlawful to use a locomotive without certain appliances, while engaged in interstate traffic, the Act of 1903 applied it to all locomotives on all railroads; and likewise the Act of 1893 which made it unlawful to use a car not up to the standard height of drawbars, was made applicable to all freight cars on all railroads. It is to be noted that before the passage of the Act of 1903 it was only unlawful to use a locomotive not equipped with a power driving-wheel brake when engaged in interstate commerce; it was only unlawful to use a car not equipped with automatic couplers when that car was used in moving interstate traffic: the Act upon its face was not operative in the District of Columbia nor in the Territories. By the amendment of 1903 these various requirements of the Act of 1893 were made applicable to common carriers in the Territories and in the District of Columbia as well as in the United States; they were made applicable to locomotives and cars whether they were being used at the time in moving interstate traffic or not. Furthermore, at the time of the passage of this Act of 1903 the case of Johnson vs. Railroad Company had been decided by the Circuit Court of Appeals and not in the Supreme Court of the United States. The Circuit Court of Appeals had held that the Act did not apply in that case because the couplers were of different make and kind. The Congress evidently undertook by this Act of 1903 to cure that defect. It was said by the Supreme Court in the Johnson case, referring to the Act of 1903:

"As we have no doubt of the meaning of the prior law, a subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative and declaratory and in effect only construed and applied the former act. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

The mere fact that this Act makes applicable the provisions of the former act to all trains, locomotives, tenders, cars and similar vehicles affords no ground for the argument that each car or vehicle
275 is to be equipped with all the appliances required for every other vehicle. It is perfectly clear that the intention of Congress was to require every locomotive on all railroads everywhere without reference to the class of service, to be equipped with appliances prescribed by the Act for locomotives, and so with the other classes of cars. All cars of a particular class were brought by this act within the provisions and requirements prescribed by the Act for the particular kind of a car involved. We might as well say that this act requires freight cars to be equipped with appliances for oper-

ating the train brake system as to say it requires locomotives to be equipped with drawbars of a standard height.

The court will not take judicial notice of the orders of the Interstate Commerce Commission.

As we have had occasion to say, there was neither pleading nor proof of the action of the Interstate Commerce Commission relied upon in this case, and for that reason the suit of the defendant in error must fail unless the court will take judicial notice not only of the fact that the Interstate Commerce Commission did act, but of the action taken as well.

Generally speaking the courts will take judicial notice of the laws of the country and the state courts will take judicial notice of the laws of the United States. In a sense, the action of the Interstate Commerce Commission is a part of the law of the country, but it is only the law by reason of the Commission having been given the authority to make certain orders relating to safety appliances in connection with interstate railroad traffic. The principal reason for the court's taking judicial notice of the law is the easy faciiities of the court unaided by the parties for ascertaining the law. Where the law itself provides the means for bringing to the attention of the courts the action of departments of the government, the courts will depend upon the parties to afford the information in accord-
276 ance with the methods prescribed by the law. In this instance Congress, as provided in the act to regulate commerce, has prescribed the method of making known to the courts the orders or action taken by it upon matters which it is authorized to act upon. The statute provides—

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

Sec. 14 of the Act to Regulate Commerce, as amended March 2, 1889 and June 29, 1906.

There seems to be no fundamental principle for determining just when the court will take judicial notice of any fact. The Supreme Court of the United States in one case undertook to lay down a general rule in this language:

"Wherever by the express language of any act of Congress, power is intrusted to either of the Departments of Government to prescribe rules and regulations for the transaction of business in which the public is interested and in respect to which they have a right to participate and by which they are to be controlled, rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Caha vs. United States, 152 U. S., 221 (38 L. E. 419.)

In that case, however, the question under consideration was whether the court should take judicial notice of the regulations prescribed by the Interior Department for hearing disputes relative to land claims. A man was indicted for perjury in an affidavit made in such an investigation and it was the regulation of the Department for governing its proceedings that the court took judicial notice of same.

Evidently the Supreme Court of the United States does not consider that rule applicable to a case of this kind for in a very recent decision that court held that the courts would not take judicial notice of the orders and decisions of the Interstate Commerce Commission. Robinson vs. Baltimore & Ohio R. R. Co., 222 U. S. p. 507 (56 L. E., 288.)

277 That was a case in which a shipper sued for reparation on account of a freight rate alleged to be unjustly discriminatory. Under the Act of Congress before the court had jurisdiction to enforce reparation it was necessary for it to be made to appear that the Interstate Commerce Commission had passed an order finding that the established schedule of rates was unjustly discriminatory, determining that reparation should be made and directing the carrier to desist from such discrimination in future, and to make the reparation indicated. The plaintiff had failed to show what order the Interstate Commerce Commission had made in his case and it was contended that the court should take judicial notice thereof. Answering this contention the court said:

"The next question to be considered is whether judicial notice should have been taken of the decision of the Commission in Glade Coal Co. vs. Baltimore & Ohio R. R. Co., wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28, 1904, and authoritatively published in 10 Inters. Com. Rep. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the supreme *court of appeals of (512) the state it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in Sec. 14 of the act, which reads: 'The commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission contained therein, in all courts of the United States and of the several states, without any further proof of authentication thereof.'

Undoubtedly this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed, or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied on. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of

evidence. The ruling, therefore, was not in contravention of the statute."

The Supreme Court of New York in Josh vs. Marshall, 53 N. Y. S., 419, adopted the same holding with respect to the regulations of the Fish Commissioners. By the laws of New York, 1895, it was made the duty of the Board of Fish Commissioners to pre-
278 scribe rules and regulations for granting licenses to nets in water when specially permitted by the act, and to file a duly authenticated copy thereof with the Secretary of State, whose duty it was to print the same in the Session Laws, which rules were to take effect on September 1, 1895; and thereafter fishing with nets without a license obtained under the rules and regulations was prohibited. Held, that judicial notice of the existence of the rules and regulations would not be taken.

It has also been held by the Supreme Court of New York that judicial notice will not be taken of the rules and regulations of the Civil Service Commissioners of the City of New York prescribed in accordance with the Civil Service law. People vs. Dalton 61 N. Y. S., 263.

The Supreme Court of New York also holds that courts can not take judicial notice of the existing provisions of the Health Department. Dept. of Health vs. City Real Property Co., 86 N. Y. S., 18.

The Court of Appeals of Georgia has held that courts will not take judicial cognizance of the schedule of rates filed by a carrier with the Interstate Commerce Commission published as required by the acts of Congress. Hartwell Railway Co. vs. Kidd, 10 Ga. App. 771.

It was held by the Supreme Court of Missouri that the courts would not take judicial notice of the Milk Standards prescribed by the United States Department of Agriculture. City of St. Louis vs. Kruempeler, 235 Mo., 710.

In Topp vs. Watson, 12 Heisk., 411, Watson sought to recover on bill of exchange against Topp, alleging that he was a trustee of the Bank of Tennessee under an assignment, and that as such trustee he was entitled to sue upon the bill as a part of the assets of the bank. An Act of the legislature had been passed directing an assignment of the assets of the bank, but as there was no evidence of the actual assignment the court was asked to take judicial notice that Watson was at the time the trustee of the assets of the bank of Tennessee.

279 Answering that contention the court said:

"We are of opinion that we can not do so. We know that an act of the Legislature was passed directing as assignment of the assets of the bank to be made; but we cannot judicially know that the assignment was made, or that Watson was appointed as the trustee, or if so, that he accepted that trust, gave the bond, and holds the position. These facts were put in issue and were questions for the jury, and the assignment should have been proved like any other deed or assignment between other parties.

We see an act of the Legislature passed in 1869, in which Watson is styled trustee of the Bank of Tennessee; but, other objections aside,

this action was brought in 1866, and therefore this act can not show that Watson was trustee when the action was brought."
12 Heisk., p. 411.

Defendant in error, Crockett, not having been injured by defective appliances under the safety appliance statute, assumed the risks incident to his injuries.

There was no contention in the Court of Civil Appeals upon the proposition that the defendant in error did actually know before he went to work at the time he was injured, of the existence of the various defective conditions which he now claims brought about his injury. In his own testimony to which we have referred, he said that these conditions had existed for several days prior to the accident; that he had been at work with this same engine over these same tracks and had noticed the engine become uncoupled on account of improper height of the draw bars on previous occasions, and twice on the very day of and before the accident.

Neither was there any contention in the Court of Civil Appeals upon the proposition that under the common law this state of facts would prevent a recovery because under such circumstances the employee would be held to have assumed the risk of being injured by defects of which he knew and the dangers of which he appreciated.

It was not seriously contended that the Employers' Lia-
280 bility Act changed the common law rule of assumption of risk in a case of this kind. But as there is so far as we know, no authoritative decision on this point, we deem it proper to call attention to some of the reasons for the view which we advocate, to-wit, that the doctrine of the common law with respect *with* assumption of risk is not abolished where the injury results from defective appliances. We concede that if the defects were in appliances prescribed by the Safety Appliance statute, the common law rule is abolished. For the convenience of the court in dealing with this question we quote the Employers' Liability Act in full:

(*Act of* 1908.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents, and if none, then to the next of kin dependent upon such employé for such injury or death resulting in whole or in part from the negligence of any of

the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employé, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents; and if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by
281 the jury in proportion to the amount of negligence attributable to such employé: Provided, however, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employé, or the person entitled thereto, on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this Act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant

shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States. (As amended April 5, 1910.)

SEC. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employés under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled, 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employés,' approved June 11, 1906.

Approved April 22, 1908.

SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (As amended April 5, 1910.)

Thornton, pp. 397-400, inc.

282 It is certain that this act does not abolish the defense of assumption of risk in so many words. It does, in so many words, abolish the rule of non-liability for contributory negligence and of assumption of risk where the injury resulted from a violation of the safety appliance laws. It probably also abolishes the doctrine of non-liability for negligence of fellow servants.

The first section of the act makes no change in the common law liability for negligence except as to the negligence of fellow servants, and as the act does specifically abolish the rule of assumption of risk where the injury results from defects in appliances prescribed by the Safety Appliance statute, the rule, the expression of one thing excludes the other, applies.

The argument in support of this view was very forcefully stated by the Court of Civil Appeals in the case of the Southern Railway Company vs. Lee Howard, etc., in the September term of that court September, 1912.

"It was urged in the court below that the doctrine of assumption of risk for defective appliances other than those required by acts of Congress relating to the safety of servants, remained as at common law. This view was taken by the learned trial judge and does not seem to be seriously disputed by counsel for defendant in error. There is room for controversy as to the soundness of this proposition.

We are, however, inclined to the view that the position of plaintiff in respect thereto is correct because of express exclusion by the Act of cases where a statute is violated. This by implication excluded from the excepting clause of the Act all other phases of assumption of risk in so far as they are distinct from contributory negligence. We are the more inclined to this position for the reason that in a plain case of the assumption of risk, laying aside for the present the defense of contributory negligence, there can be no apportionment of responsibility or of damages between the master and the servant. There would either be a palpable assumption of risk upon the part of the servant wholly defeating his right of action, or there would be full liability upon the part of the master notwithstanding the unequivocal assent of the servant to the using of the defective appliance. We look for more controversy upon this subject until it is settled either by the courts or by the Congress more definitely. There is good reason, again, for the contention that the defense remains in that the experience of those who have been governed by the common law has demonstrated that anything which prompts a servant to report defects to his master is conducive alike to the welfare of the servant and the master and also the public in general. It is also worthy of note as bearing upon the construction of this statute that the safety appliance act expressly took away the defense of the assumption of risk for a defective coupling arrangement. If this defense remains unaffected, the Federal statute is going to be considerably reduced in its operation as compared to its great breadth as it appeared to the Legislators when it was passed. But we see no other escape now if we adhere to settled rules of statutory construction."

283

In the case of Gulf C. and S. F. Railway Company vs. Maginnis, decided by the Supreme Court of the United States April 17, 1913, and reported in No. 11 of the advance sheets published by the Lawyers' Co-operative Publishing Co., the Supreme Court of the United States assumed without discussing the point that the rule of the common law of assumption of risk was not abolished by the Employers' Liability Act. That was a case of damages for personal injury under the Federal statute and with respect to this question the court said:

"It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition a number of special requests asked by the railroad company in respect to several aspects of the facts were given. The contention is that, upon all of the evidence in the case, there was no sufficient evidence of any negligence for which the company was chargeable, in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by."

284

It was held by the Court of Appeals of Georgia in Bowers vs. Southern Railway Company that under the Act of Congress prescribing liability for railroads for injury to employees, the servant may assume the risk except as to things violative of the statute.

10 Georgia Appeals, 367, 73 Southwestern, 677.

"Where the Legislature by statute extends the common law liability of a master, the presumption will be that the limit of that extension is expressed in the statute itself, and the amendment of the factory act (Pen. Code 384 L, amended by laws 1897, p. 505, c. 416, sec. 3), which made a failure to comply with its provisions a crime, but which does not provide that an employee was not to be deemed to have assumed the risk inherent to any defect which in itself is a violation of the act, will not be construed as doing away with the employé's assumption of the risk.

"Bushtis vs. Catskill Cement Co., 113 N. Y. S. 294. 128 App. 780, judgment affirmed (1910) 92 N. E. 1079, 198 N. Y. 548."

"Assumption of risk and contributory negligence are distinct and separate defenses, and the former may be pleaded, although the defense of contributory negligence is precluded by statute.—Jackson vs. Chicago, R. I. & P. Co., 178 F., 432, 102 C. C. A., 159."

"The doctrine of assumed risk is read into employers' liability act (Burn's Ann. St. 1901, Sec. 7083), making a railroad company liable for injuries to an employé, to whose orders the injured
285 employé was bound to conform, and did conform, unless the injury was due to the negligent nonobservance of a positive and fixed duty required by statute.—Cleveland C. C. & St. L. Ry. Co. vs. Bossert, 87 N. E. 158."

"A railroad company is not, under a statute making it liable for the negligence of an employee having charge of a signal, liable for the death of an engineer who ran into a switch negligently left open by such employee, where the signal upon the switch showed that it was open, and, in any event, it could not be seen because of weather conditions.

Chicago I. & L. R. Co. vs. Barker, 17: 542, 83 N. E. 369, 169 Ind., 670."

"If the servant has assumed the risk in the performance of the act wherein he was injured, and the defendant is not otherwise negligent, then such servant cannot recover."

Thornton on Federal Employers' Liability Act, section 85, p. 139, citing the following cases:

Kansas Pacific Ry. Co. v. Pointer, 14 Kansas, 37.
The Scandinavia, 156 Fed. Rep. 403;
The Saratoga, 94 Fed. Rep., 221; 36 C. C. A., 208, reversing 87 Fed. Rep., 349;
The Serapsis, 51 Fed. Rep., 92, 266; reversing 49 Fed. Rep., 393;
The Maharajah, 40 Fed. Rep., 784;
The Henry B. Fiske, 141 Fed. Rep., 188;
The Carl, 18 Fed. Rep., 655.

We submit that for the foregoing reasons, judgment of the Court of Civil Appeals be reversed and the suit dismissed.

Respectfully,

L. D. SMITH,
L. D. SMITH,
Attorney for Plaintiff in Error.

286 In the Supreme Court of Tennessee, September Term, 1913.

Filed Oct. 3, 1913. S. E. Cleage, Cl'k.

SOUTHERN RAILWAY CO.
vs.
D. E. CROCKETT.

From the Circuit Court of Knox County, Tennessee.

Reply Brief on Behalf of Defendant in Error.

I.

Petitioner's assignments of error, as understood by counsel for defendant in error, concede liability providing the defendant in error did not assume the risk incident to the defective engine, locomotive, tender, cars, roadbed, and side-track complained of—for no error was assigned in the Court of Civil Appeals and no error is assigned in this Court touching the admission or exclusion or want of evidence, or to the Court's charge—excepting only as to the recited omission of the trial judge to charge a special request made by petitioner—petitioner's assignments of error being as follows, to-wit:

287 A.

"That the Circuit Judge should have sustained the motion made by it for peremptory instructions to the jury, for the reason that Crockett knew of the existence of the defects complained of before and at the time he went to work with these defective appliances and fully appreciated the danger to him incident thereto, and therefore he assumed the risk incident to his services with the defective instrumentalities."

B.

"If the proof did not show conclusively that he knew of these defects and appreciated the danger incident thereto, there was proof tending to show his knowledge thereof and that therefore the trial judge should have given to the jury in its charge a request submitted by petitioner, as follows:

"If the jury should find from the evidence that the drawbar on the engine was defective by being too low, or the tract defective, and that this caused the engine to become detached from the cars and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff and plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had become accustomed to become uncoupled and that he appreciated the danger, then the court charges that under these

facts the plaintiff could not recover and your verdict should be in favor of the defendant."

See Petition for certiorari and supersedeas filed Oct. 3, 1913, pp. 3, 4.

II.

That there is no merit in the first assignment of error is virtually if not conclusively admitted by said second assignment, and the plain letter of the law is a positive answer to both.

288 Section 8 of the Safety Appliance Act approved March 2, 1893 reads as follows:

"That any employé of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Thornton, p. 266.

Section 4 of the Employers' Liability Act approved April 22, 1908, reads as follows:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to any of its employés, such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury of such employé."

Thornton, p. 245.

Section 3 of the Employers' Liability Act approved April 22, 1908, reads as follows:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act, to recover damages for personal injuries to an employé, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to such employé; providing, however, that no such employé who may be injured shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury of such employé."

Thornton, pp. 244, 245.

289 And while it was not insisted on the trial of this case in the Circuit Court, or in the Court of Civil Appeals, and is not now insisted that the defendant in error was guilty of contributory negligence, petitioner was erroneously given the benefit of the law touching contributory negligence in the trial court's charge to the jury.

See Transcript, pp. 169, 172.

III.

Petitioner's contention is that despite a long, vigorous and growing demand for legislation for the protection of employés of this character, and the numerous acts passed in response thereto, Congress intended that these employers should and might continue to kill and maim employés by the negligent use of defective and antiquated appliances so long as switch engines, instead of cars, were the death dealing and misery producing agencies employed—a proposition too monstrous for serious consideration, upon its very face.

In 1903 the Safety Appliance Act was amended and the first section of this amendatory act provides that the original act as amended in April 1896 shall be held to apply to common carriers by railroad in the territories, and in the District of Columbia, and shall apply in all cases whether or not the couplers brought together are of the same kind, make or shape, and that the provisions and requirements thereof and of said act relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.

See Judson (2nd Ed.) p. 607 for this amendment.

290 And thus was the standard height of drawbars then effective automatically applied by congressional mandate to all locomotives and other vehicles used—if in fact the word "car" used in the original act did not include locomotives.

In April 1910 the safety appliance was further amended in some respects, and in Section 3 of said amendatory act, referring to the Interstate Commerce Commission, it is provided as follows:

"Said Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time in which such modification or change shall become effective or obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

Thornton (2nd Ed.), p. 458.

The maximum height of drawbars as previously prescribed, when measured perpendicularly from the level of the top of rails to the center of drawbars, for standard gauged railroads in the United States, subject to the provisions of said Act, was thirty-four and one-half inches, and the minimum height of drawbars for freight cars of such standard gauged railroads, measured in the same manner, was thirty-one and one-half inches.

Thornton (2nd Ed.), p. 461.

And thus it will be seen that after so amending said Act in 1903, Congress in the interest of human life and human safety, by said amendment in 1910 denounced any variation from the standard thus fixed as unlawful pending a modification thereof by the Commission.

In Thornton, first edition, published in 1909, that eminent author uses this language: "And manifestly the word "car" was used
291 in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, "any car" meant all kinds of cars running on a railroad, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of that act."

Thornton (1st Ed.), pp. 181, 182, 183, Sec. 136.

In the case of Schlemner vs. Buffalo etc. Railroad Company, 205 U. S. pp. 1 and 10, it is pointed out by the Supreme Court of the United States that said Congressional amendment made in 1903 to said Safety Appliance Act indicated the intention of the original act.

In the case of Johnson vs. Southern Pacific Railway, 196 U. S. page 1, it was contended by counsel for the railway company that the act in question did not apply to locomotives. However, said contention was not sustained and the Court held that the word "car" used in the second section of that act included locomotives. It was pointed out in the Johnson case that the purpose of the act was to include locomotives as well as what is more commonly designated cars, and that for that reason locomotives were included, the Court saying:

"Now it was as necessary for the safety of employés in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, as Judge Thayer suggests, since engines have occasion to make couplings more frequently. And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant."

Even cars used in moving intrastate traffic on a railroad which is a highway of interstate commerce are comprehended by the provisions of the Safety Appliance Act, declaring, among other things, that its provisions and requirements shall apply to all trains,
292 locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, and for these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

So. Ry. Co. vs. U. S. 56 U. S. Law Ed. page 72.

Thus recognizing that this Federal legislation was enacted for the purpose of preserving life and limb, and construing it in the light of the purpose it was intended to serve.

It is respectfully submitted that there was no error in the action of the trial judge prejudicial to petitioner; that there was no error in the action of the Court of Civil Appeals in affirming the trial court; and that the judgment in this case should be affirmed with interest and with costs.

Respectfully submitted,

A. C. GRIMM,
Attorney for Defendant in Error.

On the 3rd day of October, 1913, Counsel for defendant in error accepted notice that a petition for certiorari and supersedeas in this case would be filed October 10, 1913, and shortly thereafter ascertained that said petition was filed October 2, 1913—to which no objection is now made.

I further certify that a copy of this brief was delivered to L. D. Smith, Esq., attorney for the plaintiff in error.

This 4th day of October, 1913.

A. C. GRIMM,
Attorney for Defendant in Error.

293 Court of Civil Appeals.

SOUTHERN RAILWAY COMPANY
vs.
D. E. CROCKETT.

Affirmed.

This case came on to be heard on the transcript of the record from the Circuit Court of Knox County, opinion and judgment of the Court of Civil Appeals, petition for certiorari and Supersedeas and briefs of counsel from all of which the Court is of opinion that there is no reversible error in the judgment of the Court of Civil Appeals, and the same will be affirmed and the petition for certiorari is dismissed.

It is accordingly ordered and adjudged by the Court that the judgment of the Court of Civil Appeals be and the same is affirmed; and that the defendant in error have and recover of the plaintiff in error the sum of One Thousand Dollars ($1,000.00), and the cost of the case; and that he also have and recover of the plaintiff in error and Jourolmon Welcker & Smith its sureties on the appeal bond, and L. D. Smith its surety on its bond for Supersedeas the further sum of Sixty Dollars & Seventy-seven cents ($60.77), said amount being the interest on the above recovery from the date of the judgment in the Circuit Court, to-wit October 16, 1912, to this date October 18, 1913, together with all the cost of the appeal for all of which execution is awarded.

On motion of A. C. Grimm, attorney for defendant in error a lien on the above recovery for his reasonable attorney fee, is hereby declared and allowed.

J. T. J.-J.

544—Oct. 22, 1913.

294 STATE OF TENNESSEE:

I, Samuel E. Cleage, Clerk of the Supreme Court of Tennessee, at Knoxville, Tennessee, do hereby certify that the foregoing is a full, true and correct transcript of the record in the case of Southern Railway Company vs. D. E. Crockett, including the assignments of error and brief of the plaintiff, in error Southern Railway Company in the reply brief of the defendant in error in the Court of Civil Appeals, the opinion of the Court of Civil Appeals, the petition of the Southern Railway Company for Certiorari, the brief of the Southern Railway Company in support of said petition, the reply brief of the defendant in error, and the final decree of the Supreme Court, as the same appears on file in my office.

In witness whereof, I hereunto affix my signature, and seal of office, this 20 day of December 1913.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE.

295 Filed Dec. 15, 1913. S. E. Cleage, Clerk. Jas. Joy, Deputy Clerk.

Document No. 2.

In the Supreme Court of Tennessee.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

The Petition of the Southern Railway Company, a railroad corporation organized under and existing by virtue of the laws of the State of Virginia, and a resident and citizen of said state, but engaged in the business of an interstate carrier by railroad in the State of Tennessee, and other states, for writ of error to the Supreme Court of the State of Tennessee in the above entitled cause.

The petitioner respectfully shows:

1. Heretofore, and on the 2d day of March 1911, D. E. Crocket a resident and citizen of the state of Tennessee, commenced in the Circuit Court of Knox County, in said state an action against the petitioner, the Southern Railway Company to recover from it the sum of Ten Thousand Dollars ($10,000) damages.

On the 21st day of April 1911, the said D. E. Crockett, in said action filed his declaration setting forth therein his cause of action; alleging that petitioner the Southern Railway Company was on the 15th of October 1910, and had been prior to that date a railroad corporation operating various lines of railroad through Knoxville in the State of Tennessee, through the States of Kentucky, Virginia and other states, and was on said date engaged in the handling of inter-

state commerce; that on the date aforesaid, and while the
296 petitioner, Southern Railway Company was engaged in interstate commerce by railroad the said D. E. Crockett was an employee of the said Southern Railway Company, engaged in the discharge of his duties as a switchman, when he was injured by reason of negligence of the petitioner, Southern Railway Company, in, among other things, that it had allowed the draw bar of its locomotive to be out of repair, and in a defective condition, so that it became unfastened and uncoupled from the cars to which it was attached, and thereby allowed said cars to run into other cars, and by the collision threw and hurled the plaintiff against the cars, and injuring him in the back, head, arms, etc.

In his said declaration the said plaintiff does not specifically aver that his right of action is governed by the United States Statute, commonly known as the Federal Employers' Liability Act, nor does he aver that his injuries resulted from a failure upon the part of the Railway Company to observe and comply with the provisions of the United States Statute, known as the Safety Appliance Act, but the facts set forth in the plaintiff's said declaration show that the said plaintiff was injured while he was employed, and engaged in the service of the petitioner while it was transporting interstate traffic, and thereby brought his case within the provisions of the said Employers' Liability Act.

In his declaration the plaintiff set forth many and various acts of negligence, but the only averment necessary to be noticed in this petition is that which charges that plaintiff's injuries resulted from the fact that the draw bar of the switch engine, which was moving the cars upon which plaintiff was employed was defective. The reason why no other averment in said declaration needs to be here noticed will more fully appear hereinafter.

297 2. On the 2d day of May, 1911, the petitioner, Southern Railway Company appeared in the said Circuit Court of Knox County, Tennessee, and answered the plaintiff's said suit, by plea, denying that it was guilty of any of the wrongs and injuries complained of, as set forth by the plaintiff in his declaration.

3. On the 16th day of October, 1912, said cause came on for hearing and trial in the said Circuit Court of Knox County, Tennessee, when the same was submitted to a jury in said Court upon the evidence introduced by the plaintiff and petitioner. The instructions of the Court, which were erroneous, as the petitioner shall undertake hereinafter to show, returned a verdict in favor of the plaintiff, and against the petitioner for One Thousand Dollars ($1,000). A motion for a new trial made in said Court on the ground hereinafter set forth, and in accordance with the rules of said Court, was by said Court overruled and judgment was pronounced against the petitioner for the said sum of One Thousand Dollars ($1,000).

4. From the judgment aforesaid pronounced by the said Circuit Court of Knox County, Tennessee, the petitioner appealed to the Court of Civil Appeals of the said State of Tennessee sitting at Knoxville in said state. In the said Court of Civil Appeals the petitioner

sought a reversal of the judgment of the Circuit Court of Knox County, Tennessee, assigning therein as error the action of the said Circuit Court in two respects, to-wit:

(1) In refusing to sustain the motion made by the petitioner to peremptorily instruct the jury to return a verdict in its favor, because it was shown by the evidence without contradiction that the defective conditions of the engine and track were well and perfectly
298 known to the plaintiff, and the dangers incident to his work therewith, were appreciated before the accident occurred, and that the plaintiff assumed the risks of injury resulting therefrom; that the particular defects not being such as are prohibited by the Safety Appliance Statutes, the Federal Employers' Liability Act did not abolish the defence of the assumption of risk applicable to the facts as stated under the common law.

(2) The Circuit Court was in error in declining to instruct the jury as requested by the petitioner, as follows:

"If the jury should find from the evidence that the draw bar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior to the time, with the knowledge of the plaintiff, and the plaintiff knew before he went to work that the defects existed at that time, and that by reason thereof, the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court should charge that under these facts the plaintiff could not recover, and your verdict should be in favor of the defendant."

This action of the said Circuit Court was in said Court of Civil Appeals, urged as erroneous, because the evidence conclusively showed, or at any rate tended to show that the plaintiff knew before he went to work that the defects existed at that time, and that by reason thereof, the engine was accustomed to become uncoupled, and that he went to work with these defective conditions existing, and with full knowledge thereof, and with appreciation of the danger incident thereto; and because the defects complained of were not such as were prohibited by any statute enacted for the safety of employees. Therefore, under the Employers' Liability
299 Statute the plaintiff could not recover, because he should be held to have assumed the risks.

The said Court of Civil Appeals disallowed and overruled all of the assignments of error filed by the petitioner in said court, and on the 28th day of August, 1913, pronounced a judgment affirming the judgment of the Circuit Court of Knox County, Tennessee, in favor of the said plaintiff against the petitioner for the sum of One Thousand Dollars ($1,000) with interest thereon and all costs of the case.

5. Thereupon, and in accordance with the provision of the statutes of Tennessee, on the 3d day of October, 1913, the petitioner filed in the Supreme Court of Tennessee, a petition asking for writs of certiorari and supersedeas to have reviewed and reversed the judgment of the Court of Civil Appeals aforesaid, setting forth in said

petition that the action of said Court of Civil Appeals was erroneous, the assignment of error being in the following words, to-wit:

"The Court of Civil Appeals was in error in holding that the Federal Safety Appliances Statute, at the time of the injury complained of, October 15, 1910, prohibited the railway company from using a switch engine with the drawbar less than thirty-one and one-half inches in height, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, and therefore in holding that the defendant in error did not assume the risks incident to the defective conditions, which he knew to exist. As there was no dispute in the evidence that he did know of these defects and fully appreciated the danger incident to service in connection therewith, the suit of the defendant in error should have been dismissed, plaintiff in error having in the court below made a motion for peremptory instructions based upon this ground."

300 "The Safety Appliance Acts authorized the Interstate Commerce Commission to designate the standard height of drawbars for "freight cars;" it did not itself fix any standard, nor authorize the Interstate Commerce Commission to fix any standard for the height of drawbars on switch engines."

The Supreme Court of Tennessee on the 22d day of October, 1913, being then in session at Knoxville, Tennessee, upon the petition of the Southern Railway Company, made and passed a final judgment and decree in this case, by which it affirmed the judgment of the Circuit Court of Knox County, Tennessee, and the judgment of the Court of Civil Appeals of said state, overruling and disallowing the petition, and assignments of error, and pronounced judgment against the petitioner and in favor of the said D. E. Crockett, in the sum of One Thousand & Sixty Dollars & Seventy-seven cents ($1,060.77), together with all the costs of the cause.

The said D. E. Crockett has demanded of the Clerk of the Supreme Court of Tennessee the issuance of, and said Clerk will issue an execution against the petitioner, and the petitioner will be compelled thereby to pay said judgment, unless the collection thereof is restrained and stayed by writs of error and supersedeas, notwithstanding said judgment is erroneous. The said judgment aforesaid of the Supreme Court of Tennessee is a final judgment in the highest Court of the State, in which a decision of said suit could or can be had.

6. The petitioner further shows that there was involved and made in said case a federal question, which was a final determina-

301 tion of the issues involved therein, and said final determination was repugnant to and in conflict with the laws of the United States, and the Acts of Congress known as the Employers' Liability Act, and the Safety Appliance Act, and the said judgment was contrary thereto, and the decision of said question was necessary to the judgment rendered.

The case involved the construction of Section 5, of the Acts of Congress, known as the Safety Appliance Acts, approved March 2, 1893, as amended by the Act of Congress April 1, 1896, which said Acts authorized the American Railway Association to designate to

the Interstate Commerce Commission the standard height of draw-bars for freight cars. The construction given by the Supreme Court of Tennessee of said statute made it applicable to a switch engine, and held the petitioner liable to the plaintiff, only because said statute required petitioner to have its switch engine equipped with a draw bar of the standard height fixed by the Interstate Commerce Commission. Said judgment could not have been rendered against the petitioner, but for such erroneous construction of said statute. Petitioner avers that said statute did not require the petitioner to have the draw bar on its switch engine of the standard height prescribed by the Interstate Commerce Commission for freight cars, and said judgment could not have been rendered against the petitioner consistently with the said Statutes of the United States.

The case further involved the construction of the Act of Congress, approved April 22, 1908, known as the Employers' Liability Act, and particularly sections 1 and 4 of said act. The Supreme Court of Tennessee, so construed said Statutes, as to hold that notwithstanding the plaintiff knew of the existence of the defects before, and at the time he went to work therewith, and fully appreciated the danger incident thereto, he did not be reason of said Statute assume the risk, and *wea* therefore entitled to recover. Said judgment could not have been rendered against the petitioner but for such erroneous construction of said statute.

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Petitioner was therefore, by the final judgment aforesaid denied rights, privileges and immunities to which it was entitled under the statutes of the United States. The decision aforesaid was against the said rights, privileges and immunities. The error committed by the Supreme Court of Tennessee in the interpretation of said statute, and in pronouncing said judgment will be more particularly pointed out in the assignments of error hereto attached, all of which was duly raised by assignments of error in the said Supreme Court of Tennessee, in the Court of Civil Appeals of Tennessee, and raised and presented in the Circuit Court of Knox County, Tennessee.

Wherefore your petitioner presents herewith an exemplified transcript of the record in said case, and prays that a writ of error to the Supreme Court of Tennessee be allowed to bring before the Supreme Court of the United States, for review and reversal, the said judgment and decree of the Supreme Court of Tennessee; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas and that the errors complained of may be reviewed and reversed by the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY,
By L. D. SMITH, *Attorney.*

L. D. SMITH,
Att'y for Petitioner.

304 *Document No. 3.*

No. 3.

Filed December 15, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

Assignment of Error on Petition of Southern Railway Company for Writ of Error to the Supreme Court of Tennessee.

The Supreme Court of Tennessee filed no written memorandum or opinion in rendering its final judgment and decree in this case, but merely affirmed the judgment of the court of Civil Appeals.

But in affirming said judgment the Supreme Court of Tennessee must have necessarily held:

(1) Either that the Employers' Liability Act of Congress abolished the defense of assumption of risk;

(2) Or that the Safety Appliance Acts of Congress required at the time of the injury sustained by the defendant in error the Southern Railway Company to have the drawbars of its switch engines comply with the standard height prescribed by the Interstate Commerce Commission for freight cars.

1. The Supreme Court of Tennessee therefore was in error in holding that the Employers' Liability Act abolished the defence of the assumption of risk. The common law rules, under which the defendant in error would not be entitled to a recovery in this case by reason of the fact that he knew beforehand, and at the time of his injuries of the very defective conditions, which he says contributed to his injuries, is not changed by the Federal statute referred to, unless the defect was one prohibited by some statute enacted for the safety of employees.

2. The only statute invoked as being applicable to the situation here enacted for the safety of employees is the statute known
305 as the Safety Appliance Act, and the act which was in force at the time of the accident in this case, did not require interstate carriers to have a standard height of drawbars on its switch engines. The requirement of the standard height of drawbars for freight cars is, and was not applicable to switch engines. Therefore, the Safety Appliance Act, not having been violated in this case, the defendant in error having full knowledge of the defective conditions, and continuing his employment with the full appreciation of the danger, assumed the risk, and was not under that state of facts entitled to any recovery. The Supreme Court of Tennessee was in error in holding otherwise. It should have held that the motion made by the petitioner, Southern Railway Company in the Circuit Court for peremptory instructions was well taken; or if there was any evidence

tending to show that Crockett did not know of the defects, and appreciate the dangers incident thereto, then the court should have reversed the judgment of the Circuit Court, and of the Court of Civil Appeals for the failure of the trial judge to instruct the jury upon the assumed state of facts, which unquestionably there was proof tending to show, and should have directed a new trial so that the correct interpretation of the law could have been given in charge to the jury.

In support of this assignment of error we submit herewith a brief discussion of the facts, and the law of the case.

L. D. SMITH,
Attorney for Southern Railway Company.

306 *Document No. 4.*

Filed December 15, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

Brief of Plaintiff in Error on Petition for Writ of Error from the United States Supreme Court.

I.

Propositions of Fact.

1. It is undisputed in this record that the plaintiff below had full knowledge of the existence of the defects, which he claimed to have contributed to his injuries, before and at the time he went to work with them, and that he appreciated the dangers incident to working therewith.

2. If not established beyond controversy, there was certainly evidence tending to show the fact to be, that the plaintiff below had full knowledge of the existence of the defects, which he claimed to have contributed to his injuries, before and at the time he went to work with them, and appreciated the dangers *to* working therewith.

These propositions of fact are shown by the opinion of the Court of Civil Appeals, whose judgment was affirmed by the Supreme Court, as follows:

(1) "Mr. Crockett had been in the service of the plaintiff in error at the Coster Yards of the Southern Railway Company at
307 Knoxville as switchman since May, 1906, when on October 15, 1910, while still so engaged, he received the injuries complained of. On the last named date, while engaged in making up a freight train, an engine with a freight car attached was being moved down grade towards where some other freight cars were standing on the track, when the car which was attached to the engine became de-

tached or uncoupled, and being propelled by gravity on toward the other cars standing on the track, it came in contact with them; and Crockett being on the car which became uncoupled, was by the impact, as he claims, thrown against the brake and injured. That he was at his post of duty on the car is not disputed.

(2) "He insists, and offered evidence tending to show that the car was caused to become detached from the engine by a defective track at that point, and an insufficient drawbar on the engine. He testified, and offered other testimony tending to show that the ground on which the track was laid at the point where the care became detachel was wet and marshy and the ties were broken and insufficient, so that the track was uneven and rough, and as a result the car and engine attached to it were made to alternately go up and down at the ends where they were coupled together as they passed over the defective track; and tending to further show that the drawbar on the engine which was used in coupling the car to the engine was not over two and one-half feet, or thirty inches high measured from the center of the track to the center of the knuckle of the drawbar, and that because of these conditions operating together the car was caused to become detached."

(3) "As a basis of fact for the contention that Mr. Crockett knew of the condition of the track, and of the drawbar on the en-
308 gine, it can be said that he admitted that he knew of these conditions, and knew further that cars had been becoming detached from the engine, and yet remained in the service.

II.

Propositions of Law.

1. Crockett, the plaintiff below, having full knowledge of the defects, and appreciating the dangers incident thereto assumed the risk of injury, and was therefore not entitled to any recovery. The fact that he was employed at the time by an interstate carrier in interstate commerce, and thus leaving his rights, and the railroad company's liability to be governed by the Employers' Liability Act does not effect the question, because that act does not abolish the defense of the assumption of risk, except where the violation of any statute enacted for the safety of employés contributed to the injury.

2. The only defect claimed to have existed in this case, and prohibited by the Safety Appliance Act, is that the drawbar of the switch engine, which was engaged in switching the cars, upon which he was injured, was lower than the standard height of drawbars provided by the Interstate Commerce Commission for freight cars. That requirement does not apply to switch engines. A switch engine is not a freight car within the meaning of the act and the resolution of the Interstate Commerce Commission.

III.

Argument.

1. Did the safety Appliance Acts in force at the time of the injury involved in this case, require of railroad companies the duty
309 of having the drawbars on switch engines at a minimum height of thirty-one and one-half inches above the level of the tops of the rails?

Section 5 of the Safety Appliance Act, approved March 2, 1893, amended April 1, 1896, is as follows:

"SECTION 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

While there is no evidence of the fact in this record, we understand that the American Railway Association, pursuant to the above provisions of the Safety Appliance Act, on June 6, 1893, adopted, and certified to the Interstate Commerce Commission, the following resolutions:

310 (1) "Resolved, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be three inches."

(2) "Resolved, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for the narrow gauge railroads in the United States shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches." Thornton 147.

Reading this statute in connection with the resolution of the American Railway Association, it is scarcely conceivable that the provisions of the act relating to the height of drawbars could be

made to apply to switch engines. Indeed, the Court of Civil Appeals concedes as much and finds it necessary, in order to reach its conclusions, to resort to other acts and provisions relating to safety appliances.

The view taken by the Court of Civil Appeals, which is the strongest that can be urged in favor of their position, may best be stated in the language of the opinion delivered by Justice Hughes:

"By referring to that part of the fifth section of the Safety Appliance Act hereinbefore copied it is seen that it applies to and regulates the standard height of drawbars for "freight cars," and likewise that the order of the Interstate Commerce Commission in like manner applies to the height of drawbars for "freight cars;" and it is clear, a strict construction of these terms might well so limit them as to exclude locomotives, but by reference to that portion of the amendment of the Safety Appliance Act passed in 1910, hereinbefore copied, it will be seen that the Interstate Commerce Commission is there given authority to modify or change the standard of heights on drawbars and to fix a time within which such modification or change shall become effective, and that prior to the time so fixed it is declared that "it shall be unlawful to use any car or vehicle," etc., which does not comply with the standard so prescribed. And again it is provided in the same connection that "after the time so fixed it should be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard prescribed by the commission." The very use of the term car or vehicle would indicate that more than the car is meant to be included. But this is not all, nor even the most forceful or convincing provision of the Safety Appliance Act. By reference to that part of the amendatory act passed in 1903 it is provided that the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad," etc. Here is the express direction that the act regulating the height of drawbars shall be held to apply to locomotives."

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(Opinion pp. 6 and 7.)

As said in the opinion of the Court of Civil Appeals, the act of 1893 and the resolution of the American Railway Association in pursuance thereof, only purports to regulate the height of drawbars for freight cars. The term "freight car" is so universally known to describe a particular kind of car that it hardly seems possible to be possible for it to be construed to mean a switch engine. Undoubtedly a freight car is not any kind of a car. For example, it is not a passenger car. It is a particular kind of a car. One told to observe a freight car would hardly expect to see a switch engine.

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Webster in his dictionary gives what everybody knows to be a correct definition of a freight car. He says it is "A railroad car especially designed for holding freight." He defines "freight" to be, "the cargo or any part of the cargo of a ship or railroad car; lading; that which is carried by water or by land; as 'the freight by the com-

pany was mostly wheat;' 'the schooner's freight was coal; a freight train; loaded with passengers and freight.'

The Encyclopædia Brittanica, un- the title of "Railroads in the United States," in discussing the different kinds of cars used in railway service, divides them into locomotives, passenger cars and freight cars. Of freight cars it is said:

"Freight cars of today are from thirty-four to forty feet in length, weight from 29,000 to 36,000 pounds and carry loads from 60,000 to 70,000 pounds, the 60,000 pound car being now considered the standard.

In variety, freight cars are especially adapted to many uses. There are now ventilated refrigerator cars for the transportation of fruits, vegetables, fresh meats and other perishable goods; cattle-cars with arrangements for watering and feeding stock while in transit; single and double deck cars for sheep and hogs; improved box cars for general merchandise; special cars for furniture and other light bulk freight; improved flat-cars for lumber and stone; double and single hopper-bottom cars for coal, crushed stone,
313 etc., and special cars for ores, of which the heavier ones are often lined with iron plates. There are poultry cars, in which birds are fed and watered. Other special cars are caboose-cars, horse-cars, coke-cars, barrel-cars, as well as flat-cars from 60 to 70 feet in length, upon which street cars are to — shipped." Enc. Brit. Vol., 28, p. 537.

Congress is presumed to have used this term in its common acceptance. We might as well say that Congress in requiring that locomotives should be equipped with the power driving wheel brake system, intended the term locomotive to apply to freight cars, as to say that the provisions with respect to the height of drawbars for freight cars applied to locomotives.

That Congress did intend in referring to freight cars to mean the kind of cars which the words described, and which they are commonly accepted to mean, becomes manifest when we consider in connection therewith the further provision found in the same section and following immediately after the language conferring authority on the Interstate Commerce Commission to designate the standard height of drawbars for freight cars, to-wit:

"And shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars."

Thus showing that the car which was to have a standard height, was a car which would sometimes be empty and sometimes loaded. A freight car is a car upon which freight is loaded for carriage, and from which freight is unloaded when it is no longer to be carried. Nobody ever heard of a loaded switch engine, nor an
314 empty switch engine. Switch engines are not used for the purpose of being loaded with freight. A passenger car might be referred to as being empty or loaded. The very construction of a locomotive contradicts the idea that the statute was intended to embrace a switch engine within the meaning of the term "freight car." The draw bar of a freight car is attached to the body of the car, which is built up on trucks somewhat like the bed of a wagon, and

is on springs. When the car is loaded the body is pressed downward and thereby the drawbars are brought nearer to the level of the rails, hence the necessity for the provision fixing a variation in the maximum height of empty and loaded cars. Such is not the case with the switch engine. The drawbar is attached to the pilot beam, and its height from the rails remains the same so far as being affected by a load is concerned. The engine is the instrument which carries the power. It is never used for the purpose of carrying freight. To say that a switch engine is a freight car, is to do violence to men's understanding of the meaning of terms.

2. Arguments of Court of Civil Appeals, Answered. But let us see whether this same and common understanding of the term "freight car" can be stretched to include a switch engine by the considerations referred to in the opinion of the Court of Civil Appeals.

(1) It is said that in the opinion of the Supreme Court of the United States in the case of Johnson vs. Railroad Company, 196 U. S., p. 1 (49 L. E. 363), in construing section 2 of the Safety Appliance Act of 1893, a locomotive was held to be a car, and that said section in making it unlawful for a common carrier to
315 haul or use on its line "any car" not equipped with couplers coupling automatically by impact, prohibited the use of locomotives not so equipped.

An examination of the case we think will sufficiently answer the argument on this point. The Supreme Court was dealing with a case which involved the failure of a railroad company to equip its locomotives with couplers coupling automatically by impact. The plaintiff in that case had been injured by reason of having to make a coupling of an engine not so equipped.

In order that the exact words of the section involved in that case may be immediately before the court, we quote it:

"SEC. 2. That on and after the first day of January, 1893, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of a man going between the ends of the cars."

It is to be noted that this provision embraces "any car" which of course, means all cars, and the question presented to the Supreme Court was not whether a locomotive was a freight or a passenger car, but whether it was a car at all:

On this point the court said:

"And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object 'any car' meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions, and by many judicial decisions, some of them having been rendered in construction of this act."

The effort of the counsel for the railway company in that case

was to give the term "any car" a restricted meaning. It
316 could not be denied that the words "any car," by their general meaning would embrace a locomotive, so it was contended that the words could not embrace locomotives because locomotives were elsewhere in terms required to be equipped with power driving wheel brakes, and that the rule, "the expression of one thing excludes another," applied. In other words, it was argued that because section 1 of the act required locomotives to be equipped with a certain kind of appliance, section 2, therefore, referred to other kinds of cars than locomotives. But this argument was answered by the fact that it was not only proper for a locomotive to be equipped with a train brake system, but the same reasons applied for equipping locomotives with the safety coupling appliances, and the object of the act being the protection of employees, a narrow construction would not be adopted so as to exclude from the provisions of the act some of the instrumentalities clearly embraced within the meaning of the general terms used. In determining whether the legislature intended a limited and restricted meaning to be applied to the words used, the court could properly look to the general intention and purpose of the act.

But this reasoning does not apply to the provision with respect to the standard height of freight cars, for the reason that Congress used words of restricted and well known meaning. It might be conceded for the sake of argument, that there was just as much reason for having the draw bars of a locomotive of a standard height as existed for freight cars, but it is the intention of the act that we are to arrive at, and since the Congress has used language which clearly defines the particular kind of a car intended to be embraced by the provisions, there is no occasion for resort to the general need which
317 might exist for the kind of legislation not covered by the manifest meaning of the language used. Suppose Congress had said any freight car painted black should be equipped with draw bars of a certain height. Of course there is the same need for a freight car painted white to be so equipped, but no one would say that Congress meant a white car when it said a black car, merely because there was the same need of the provision for white as black. This would indeed be making black look white.

This interpretation of the statute becomes more manifest, if possible, when we bear in mind that section 2 of the act which was under construction in the Johnson case, in defining the kind of cars to which the automatic couplers applied used the general and broad term "any car"; whereas in the same act when the Congress undertakes to fix the standard height for draw bars, it specifies the particular kind of car, using the term "freight car." By section 1, the kind of car that was to be equipped with the train brake system was a locomotive. By section 2, the kind of car that was to be equipped with automatic couplers was "any car," or all cars, whereas by section 5, the kind of a car on which the height of draw bars was regulated, was a freight car.

The controlling thought in the opinion in that case is that all the considerations including the object and purpose of the statute, the

necessities for the particular appliance, the general meaning of the term, and all went to show that Congress, in using the words "any car" used them in a very broad and generic sense and meant thereby to include all kinds of cars which run on the rails, and therefore necessarily included locomotives.

(2) The words "all cars" in section 2 not applicable to height of draw bars. Another suggestion made by the Court of Civil Appeals in support of its opinion is that by section 2 of the act of 1893, it is made unlawful for any common carrier engaged in interstate
318 commerce "to haul or permit to be hauled or used on its line any car used in interstate traffic not equipped with couplers," etc. With respect to this the court says in its opinion:

"Here is the use of the word 'cars' alone rather than the term "freight cars" as found in the fifth section, and the order of the Interstate Commerce Commission hereinbefore set out."

It will be seen that in the opinion of the Court of Civil Appeals the words "to haul or permit to be hauled or used on its line, any car used in interstate traffic not equipped with couplers," are between quotations marks. The quotation is taken from the second section of the act of 1893. If the judge had quoted the balance of the sentence instead of substituting the letters, "etc.," it would have instantly occurred to him that that section had no application whatever to the height of drawbars.

We have had occasion heretofore in this brief to quote this section, and it is only necessary here to call attention to the fact that it is made unlawful thereby for any common carrier to haul or use any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars. It is true that this section uses the term "any car," but when the quotation is completed, it is seen that the prohibition is against the use of "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It is so manifest that the court in referring to this section
319 of the act overlooked its application alone to coupling appliances, that it has occurred to us that the court may have intended to quote from section 2 of the act of 1910. If so, the quotation when completed is equally unfortunate, for the position sought to be illustrated. Section 2 of the act of 1910 makes it unlawful for a common carrier to haul or use on its line "any car subject to the provisions of this act not equipped with the appliances provided for in this act, to-wit:

"All cars must be equipped with secure sill steps and efficient hand-brakes; all cars requiring secure ladders, secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders should also be equipped with secure handholds, or grab irons on their roofs at the tops of such ladders."

So it will be seen that neither section 2 of the act of 1893, nor section 2 of the act of 1910 has any application whatever to the requirement for a standard height of drawbars, and instead of show-

ing that the provision with respect to the standard height for the drawbars of freight cars is applicable to all kinds of cars, it shows the very reverse, because, in referring to such equipment as automatic couplers, ladders, running boards, etc., the Congress used the generic term *of* "any car," whereas in relation to the height of drawbars it used the restricted term "freight cars;" thus making manifest that the Congress intended to make a distinction between freight cars and other kinds of cars.

(3) Effect of the Act of 1910. Another suggestion of the Court of Civil Appeals is, that the act of 1910, which is primarily an act for the purpose of requiring all cars to be equipped with secure handholds, running boards, etc., at the end of section 3 gives au-
320 thority to the Interstate Commerce Commission to modify or change and to prescribe the standard height of drawbars, and fix the time within which such modification or change shall become effective and obligatory. But it is the concluding part of that provision to which the Court of Civil Appeals calls attention as having the effect to extend the regulations of the Commission to every kind of car, to-wit:

"and prior to the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed, or the standard so prescribed, and after the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

It is to be borne in mind that the acts of 1910, which was passed April 14th of that year, did not become effective until December 31st, which was after the accident involved in this case. The Interstate Commerce Commission, according to our information, on the 10th of October, 1910, passed the following resolution with respect to the standard height of drawbars:

"It is ordered. That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with laws hereby modified and changed in the manner hereinafter prescribed, to-wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the center of drawbars for standard gauge railroads in the United States subject to said
321 Act shall be thirty-four and one-half inches, and the maximum height of drawbars for freight cars on such standard gauge railroads measured in the same manner shall be thirty-one and one-half inches, and on narrow gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be twenty-six inches, and the minimum height of drawbars for freight cars on such narrow gauge railroads measused in the same manner shall be twenty-three inches, and on two-foot gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be seventeen

and one-half inches, and the minimum height of drawbars for freight cars on such two-foot gauge railroads measured in the same manner shall be fourteen and one-half inches.

And it is further ordered. That such modification or change shall become effective and obligatory December 31, 1910."

This Act of 1910, only made it unlawful to use a car that
322 did not comply with the previous regulations of the Interstate Commerce Commission. The statute does not change or enlarge the scope of the regulations, which had previously been made. The Commission had only prescribed the regulations with respect to the height of drawbars for freight cars, and it was only such cars, that by this act it was made unlawful to use.

The whole clause gets right back to the original act of 1893, and the order of the Interstate Commerce Commission issued in pursuance thereof. It is true this provision makes use of the general term "any car or vehicle," but the context shows that the car or vehicle referred to was such car as did not comply with the standard previously prescribed by the Commission, and when we look back to what the Commission had done, we find that it had prescribed a standard for freight cars merely.

This suggestion of the Court of Civil Appeals, makes it necessary to examine the whole act of 1910, and in connection therewith the resolution of the Interstate Commerce Commission in pursuance thereof. The view taken by the Court of Civil Appeals is, that because the act, in referring to the various equipments required by it and the act of 1893, groups the appliances and vehicles to which they are to be applied, and in general terms provides that all the vehicles must be equipped with all the appliances; that therefore, every car of every kind must be equipped with every kind of appliance referred to in the act.

323 The first section of this act provides that its provisions shall apply to every vehicle subject to the act of March 2, 1893, and to the amendments of 1896 and 1903, commonly known as the "Safety Appliance Acts." This section taken alone would require every car without reference to its kind, which would include locomotives and flat cars, to be equipped with running boards and ladders, whereas, when the second section of the act is examined it will be found that running boards and ladders are to be applied only to cars which require ladders and running boards. So that in order to determine what vehicles any particular appliance is to be equipped with, we must ascertain what particular appliance has been provided for the particular vehicle, and of course if all cars are required to have a particular appliance, then this act requires all cars to have that particular appliance; but if a particular kind of car is required to have only a particular kind of appliance, then this act only requires that all vehicles of that kind shall be equipped with the particular appliance provided by the act for it. To illustrate: The previous act had made it unlawful to use any car not equipped with automatic couplers; the act of 1910 makes that provision apply to all cars, whether engaged in interstate service or not, and it makes no difference whether the car is a flat car or a locomotive, it must be

equipped with the automatic coupler: As the act does not designate ladders and running boards except on such cars as require ladders and running boards, the object of the provision is to have all cars which do require ladders and running boards to be equipped with such ladders and running boards.

Section three authorizes the Interstate Commerce Commission to designate the number, dimensions, location, and manner of application of the various appliances required by the different
324 safety appliance acts provides that the standard of equipment prescribed by the Commission shall be used on all cars subject to the provisions of the act. By the interpretation sought to be applied by the Court of Civil Appeals, each and every car would have to be equipped according to the standard prescribed by the Interstate Commerce Commission for every kind of a car. This provision simply means that every car for which the Commission establishes a particular standard of equipment shall, comply with that standard of equipment. It certainly does not mean that a car must have the equipment provided by the Commission for other cars where that equipment is not required for the particular car.

Section five provides that nothing in the act shall be construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from the provisions, powers, duties, liabilities, or requirements of the safety appliance acts. This provision certainly does not mean to impose upon the Interstate Commerce Commission the duties which the act had imposed upon the common carrier, nor vice versa, to impose upon the common carrier the powers, duties, liabilities, or requirements of the Interstate Commerce Commission or the United States attorney. The rule of interpretation adopted by the Court of Civil Appeals would construe this act as imposing upon the carriers the powers and duties of the Interstate Commerce Commission, and would require the United States attorney to perform the duties imposed upon the common carrier.

These suggestions it seems to us conclusively show that a proper construction will not extend the requirement for appliances to cars not specifically required to have the appliances and that the purpose of the statute is to bring within the purview thereof all cars of all kinds requiring every car of a particular kind to be
325 equipped with the appliances prescribed for the particular kind of a car.

(4) Effect of the Amendment of 1903. The Court of Civil Appeals refers to the amended act of 1903 as being the most forceful and convincing provision in support of the interpretation given by the court, that a switch engine is a freight car within the meaning of the act relating to the height of drawbars, because of the provision therein to the effect that the acts passed for the promotion of the safety of employees and travelers upon railroads shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroads engaged in interstate commerce, etc.

That the Court of Appeals has misconceived the scope of the act

of 1903 we think will appear clearly upon a study of its various provisions.

The argument of the Court of Civil Appeals is that because this statute refers specifically to locomotives, tenders, cars and similar vehicles and provides for the application of the various Safety Appliance Acts to all these kinds of cars, that therefore a switch engine is brought within the meaning of the words "freight cars" mentioned in the fifth section of the original act.

What this Act of 1903 means is this: All of the locomotives used on all railroads engaged in interstate commerce in the Territories and the District of Columbia as well as in the United States, should be equipped with the appliances provided by the original act for locomotives, and so with the other classes of cars. All cars of every interstate carrier in the United States, the Territories and the District of Columbia are to be equipped with the appliances required by the act for such cars. All freight cars of the interstate
326 roads in the United States, in the District of Columbia and in the Territories, shall have a standard height of drawbars. Any other interpretation of this act would require freight cars to be equipped with the appliances required for locomotives.

To illustrate: Section one of the Act of 1893 makes it unlawful for any interstate carrier by railroad to use any locomotive in moving interstate traffic not equipped with the power driving-wheel brake and appliances for operating the train brake system. The construction of the Court of Appeals of the Act of 1903 would require common carriers to equip each and every car whether freight car, passenger car or any other kind of car with the appliances with which a locomotive is required to be equipped. Section two of the Act of 1893 makes it unlawful for any car to be used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc. This section being applicable to all sorts of cars as respects automatic couplers, the Act of 1903 makes it applicable not only to all kinds of cars but to all cars of all kinds, whether used in moving interstate traffic or otherwise, or whether engaged in the Territories or in the District of Columbia or elsewhere. In other words, where the original act made it unlawful to use a locomotive without certain appliances, while engaged in interstate traffic, the Act of 1903 applied it to all locomotives on all railroads; and likewise the Act of 1893 which made it unlawful to use a car not up to the standard height of drawbars, was made applicable to all freight cars on all railroads. It is to be noted that before the passage of the Act of 1903 it was only unlawful to use a locomotive not equipped with a power driving-wheel brake when engaged in interstate commerce; it was only unlawful to use a car not equipped with automatic
327 couplers when that car was used in moving interstate traffic. The act upon its face was not operative in the District of Columbia nor in the territories. By the amendment of 1903 these various requirements of the Act of 1893 were made applicable to common carriers in the Territories and in the District of Columbia as well as in the United States; they were made applicable to locomotives and cars whether they were being used at the time in moving in-

terstate traffic or not. Furthermore, at the time of the passage of this Act of 1903 the case of Johnson vs. Railroad Company had been decided by the Circuit Court of Appeals, and not in the Supreme Court of the United States. The Circuit Court of Appeals had held that the Act did not apply in that case because the couplers were of different make and kind. The Congress evidently undertook by this Act of 1903 to cure that defect. It was said by the Supreme Court in the Johnson case, referring to the Act of 1903:

"As we have no doubt of the meaning of the prior law, a subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative and declaratory and in effect only construed and applied the former act. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

The mere fact that this Act makes applicable the provisions of the former act to all trains, locomotives, tenders, cars and similar vehicles affords no ground for the argument that each car or vehicle is to be equipped with all the appliances required for every other vehicle. It is perfectly clear that the intention of Congress was to require every locomotive on all railroads everywhere without reference to the class of service, to be equipped with appliances prescribed by
328 the Act for locomotives, and so with the other classes of cars. All cars of a particular class were brought by this act within the provision and requirements prescribed by the Act for the particular kind of a car involved. We might as well say that this act requires freight cars to be equipped with appliances for operating the train brake system as to say it requires locomotives to be equipped with drawbars of a standard height.

3. Defendant in Error, Crockett, not Having Been Injured by Defective Appliances Under the Safety Appliance Statute, Assumed the Risks Incident to His Injuries. There was no contention in the Court of Civil Appeals upon the proposition thtat the defendant in error did actually know, before he went to work at the time he was injured of the existence of the various defective conditions which he now claims brought about his injury. In his own testimony to which we have referred, he said that these conditions had existed for several days prior to the accident; that he had been at work with this same engine over these same tracks and had noticed the engine become uncoupled on account of improper height of drawbars on previous occasions, and twice on the very day before the accident.

Neither was there any contention in the Court of Civil Appeals upon the proposition that under the common law this state of facts would prevent a recovery because under such circumstances the employee would be held to have assumed the risk of being injured by defects of which he knew and the dangers which he appreciated.

It was not seriously contended that the Employers' Liability Act changed the common law rule of assumption of risk in a case of this kind. But as there is, so far as we know, no authoritative decision on this point, we deem it proper to call attention to some of
329 the reasons for the view which we advocate, to-wit; that the doctrine of the common law with respect to assumption of risk

is not abolished where the injury results from defective appliances. We concede that if the defects were in appliances prescribed by the Safety Appliance statute, the common law rule is abolished. For the convenience of the court in dealing with this question, we quote from the Employers' Liability Act, sections 1 and 4, the only sections bearing on this question:

"SECTION 1. That every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia, or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents, and if none, then to the next of kin dependent upon such employé for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

"SECTION 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed *to* risk of his em-
330 ployment in any case where the violation of such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

It is certain that this act does not abolish the defense of assumption of risk in so many words. It does, in so many words, abolish the rule of non-liability for contributory negligence and of assumption of risk where the injury resulted for a violation of the safety appliance laws. It probably also abolishes the doctrine of non-liability for negligence of fellow servants.

The first section of the act makes no changes in the common law liability for negligence except as to the negligence of fellow servants, and as the act does specifically abolish the rule of assumption of risk where the injury results from defects in appliances prescribed by the Safety Appliance statute, the rule, "the expression of one thing excludes another," applies.

The argument in support of this view was very forcefully stated by the Court of Civil Appeals in the case of the Southern Railway Company vs. Lee Howard, etc., at the September term 1912.

"It was urged in the court below that the doctrine of assumption of risk for defective appliances other than those required by acts of congress relating to the safety of servants, remained as at common law. This view was taken by the learned trial judge, and does not seem to be seriously disputed by counsel for defendant in error. There is room for controversy as to the soundness of this proposition. We are however, inclined to the view that the position of plaintiff

in respect thereto is correct because of express exclusion by the act of cases where a statute is violated. This by implication ex-
331 cluded from the excepting clause of the Act all other phases of assumption or risk insofar as they are distinct from contributory negligence. We are the more inclined to this position for the reason that in a plain case of the assumption of risk, laying aside for the present the defense of contributory negligence, there can be no apportionment of responsibility or of damages between the master and the servant. There would either be a palpable assumption of risk upon the part of the servant wholly defeating his right of action, or there would be full liability upon the part of the master notwithstanding the unequivocal assent of the servant to the using of the defective appliance. We look for more controversy upon this subject, until it is settled either by the courts or by the congress more definitely. There is good reason again, for the contention that the defense remains, in that the experience of those who have been governed by the common law has demonstrated that anything which prompts a servant to report defects to his master is conducive alike to the welfare of the servant and the master, and also the public in general. It is also worthy of note as bearing upon the construction of this statute that the safety appliance act expressly took away the defense of the assumption of risk for a defective coupling arrangement. If this defense remains unaffected, the Federal statute is going to be considerably reduced in its operation as compared to its great breadth as it appeared to the Legislators when it was passed. But we see no other escape now, if we adhere to settled rules of statutory construction."

In the case of Gulf C. and S. F. Railway Company vs. Maginnis, decided by the Supreme Court of the United States, April 17, 1913, and reported in No. 11 of the advance sheets of the Lawyers'
332 Co-operative Publishing Company, the Supreme Court of the United States assumed without discussing the point that the rule of the common law of assumption of risk was not abolished by the Employers' Liability Act. That was a case of damages for personal injury under the Federal statute, and with respect to this question the court said:

"It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition to a number of special requests asked by the railroad company in respect to several aspects of the facts were given. The contention is that, upon all the evidence in the case, there was no sufficient evidence of any negligence for which the company was chargeable in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by."

It was held by the Court of Appeals of Georgia in Bowers vs. Southern Railway Company that under the Act of Congress prescribing liability for railroads for injury to employees, the servant may assume the risk except as to things violative of the statute.

10 Georgia Appeals, 367, 73 Southwestern, 677.

"Where the legislature by statute extends the common law liability of a master, the presumption will be that the limit of that extension is expressed in the statute itself, and the amendment of the factory act (Pen. Code 384 L, amended by laws 1897, p. 505, c. 416, sec. 3), which made a failure to comply with its provisions a crime,
333 but which does not provide that an employee was not to be deemed to have assumed the risk inherent to any defect which in itself is a violation of the act, will not be construed as doing away with the employé's assumption of the risk.

"Bushtis vs. Catskill Cement Co., 113 N. Y., S., 294. 128 App. 780, judgment affirmed (1910) 92 N. E. 1079, 198 N. Y. 548."

"Assumption of risk and contributory negligence are distinct and separate defenses, and the former may be pleaded, although the defense of contributory negligence is precluded by statute.—Jackson vs. Chicago, R. I. & P. Co., 178 F., 432, 102 C. C. A., 159."

"The doctrine of assumed risk is read into Employer's Liability Act (Burns' Ann. St. 1901, Sec. 7083), making a railroad company liable for injuries to an employé, to whose orders the injured employé was bound to conform, and did conform unless the injury was due to the negligence unobservance of a positive and fixed duty required by statute.—Cleveland C. C. & St. L. Ry. Co., vs. Bossert, 87 N. E. 158."

"A railroad company is not under a statute making it liable for the negligence of an employé having charge of a signal, liable for the death of an engineer who ran into a switch negligently left open by such employee, where the signal upon the switch showed that it was open, and in any event, it could not be seen because of weather conditions.—Chicago I. & L. R. Co., vs. Barker, 17: 542, 83 N. E. 369, 169 Ind., 670."

"If the servant has assumed the risk in the performance of the act wherein he was injured, and the defendant is not otherwise negligent, then such servant cannot recover."

Thornton on Federal Employer's Liability Act, section 85, p. 139, citing the following cases:

334 Kansas Pacific Ry. Co., v. Pointer 14 Kansas, 37.

The Scandinavia, 156 Fed. Rep. 403;

The Saratoga, 94 Fed. Rep., 221; 36 C. C. A. 208 reversing 87 Fed. Rep. 349;

The Serapsis, 51 Fed. Rep., 92, 266; reversing 49 Fed. Rep., 393;

The Maharajah, 40 Fed. Rep., 784;

The Henry B. Fiske, 141 Fed. Rep., 188;

The Carl, 18 Fed. Rep., 655.

We submit that for the foregoing reasons, the judgment of the Supreme Court should be reversed and the suit dismissed.

Respectfully,

L. D. SMITH,
Attorney for Plaintiff in Error.

335 *Document No. 5.*

Filed December 15, 1913. S. E. Cleage, Supreme Court Clerk.

In the Supreme Court of the State of Tennessee.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

The above entitled cause coming on to be heard upon the petition of the Southern Railway Company for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee, seeking a review in the said Supreme Court of the United States, and reversal therein of the decree pronounced by the Supreme Court of the State of Tennessee in this cause, upon examination of said petition and the record in the case, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by said record, it is therefore ordered that a writ of error be, and is hereby allowed to the Supreme Court of the State of Tennessee from the Supreme Court of the United States, and said writ of error will operate as a supersedeas, and for that purpose the bond is hereby fixed at the sum of Two Thousand Dollars ($2,000). This order will become effective upon the execution, and approval of a proper bond in the amount above stated.

Done at Knoxville, Tennessee, this 29 day of November 1913.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed in my office 15 day of December 1913.

S. E. CLEAGE,
Clerg of the Supreme Court of the State of Tennessee, at Knoxville.

336 *Document No. 6.*

Filed December 15, 1913. S. E. Cleage, Clerk Supreme Court, Tennessee.

Copy of Bond.

Know all men by these presents: that we the Southern Railway Company as principal, and the Maryland Casualty Company as surety are held and firmly bound unto D. E. Crockett in the sum of Two Thousand Dollars ($2,000.00), to be paid to the said Crockett, his representative or assigns, and to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of November, 1913.

Whereas, the Southern Railway Company has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment rendered by the Supreme Court of the State of Tennessee, against it and in favor of the said D. E. Crockett for the sum of One Thousand Sixty Dollars and Seventy-seven cents ($1,060.77), rendered on the 22d day of October, 1913; now therefore the provisions of this obligation are such that if the said Southern Railway Company shall prosecute its said writ of error with effect, and shall answer for all costs and damages, if it shall fail to make its plea good, then this obligation shall be void; otherwise remain in full force and effect.

SOUTHERN RAILWAY COMPANY,
By L. D. SMITH, *Attorney.*
MARYLAND CASUALTY COMPANY,
By RICHARD P. JOHNSON,
Attorney in Fact.

I hereby approve the foregoing bond and security, this the 29th day of November, 1913.

M. M. NEIL,
Chief Justice of the Supreme Court,
of the State of Tennessee.

337 *Document No.* 7.

Filed December 15, 1913. S. E. Cleage, Clerk Supreme Court Tennessee.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between D. E. Crockett and Southern Railway Company, corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being
338 inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 13th day of December, in the year of Our Lord One Thousand Nine Hundred and Thirteen.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
Clerk District Court of United States, District of Tennessee.

12/12/13.

HORACE VAN DEVENTER,
Cl'k U. S. D. C't,
By C. A. HILL, *D. C.*

Allowed:

——— ———,
Chief Justice of Supreme Court of Tennessee.

Fee for issuing writ of error $1.00 p'd by L. D. Smith Esq., 12/12/13. Horace Van Deventer, Cl'k U. S. D. C't.

339 *Document No.* 8.

Filed December 20, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to D. E. Crockett, ——, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Tennessee, wherein Southern Railway Company, corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Tennessee, this 19th day of December 1913.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Attest:

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk of the Supreme Court of the State of Tennessee.

STATE OF TENNESSEE,
County of Knox:

340 *Document No.* 9.

Filed December 20, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

The State of Tennessee to Honorable S. E. Cleage, Clerk of the Supreme Court of Tennessee, at Knoxville, Tennessee:

I do hereby deputize you to serve upon D. E. Crockett the citation hereto attached by delivering to him, or to his attorney a true and certified copy of said citation, said citation admonishing the said D. E. Crockett to appear before the Supreme Court of the United States at Washington, D. C. within thirty days from the date thereof, pursuant to the writ of error filed in the office of the clerk of the Supreme Court of Tennessee, wherein Southern Railway Company is plaintiff in error, and the said D. E. Crockett is defendant in error to show cause, if any there be, why the judgment rendered by the Supreme Court of Tennessee against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Tennessee, this 19th day of December 1913.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

341 *Document No.* 10.

Return of Service.

STATE OF TENNESSEE,
Knox County, ss:

S. E. Cleage, of lawful age, being first duly sworn, on oath deposes and says:

I was authorized and deputized, by Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, to serve upon the defendant, in error, the citation hereto attached. I served

the same by delivering personally to A. C. Grim-, attorney for D. E. Crockett, defendant in error, a true and certified copy of said citation with all endorsements thereon, at Knoxville, Tenn., December 20, 1913, at Knoxville Tenn.

Witness my hand this December 20, 1913.

S. E. CLEAGE.

Sworn to and subscribed to before me this December 20, 1913.

[Seal of A. C. Harmon, Notary Public, Knox Co., Tenn.]

A. C. HARMON,
Notary Public, Knox County, Tenn.

342 *Document No.* 11.

Filed December 20, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

KNOXVILLE, TENN., *Dec.* 20, 1913.

I have this day received from L. D. Smith, attorney for the Southern Railway Company, the following papers in the case of Southern Railway Company, plaintiff in error, versus D. E. Crockett, defendant in error, to-wit:

Copy of original petition for writ of error.

Copy of writ of error issued by Horace Van Deventer, U. S. District Clerk.

Copy of citation issued by M. M. Neil, Chief Justice Supreme Court of Tennessee.

Copy of order by Chief Justice Neil allowing writ of error.

Copy of brief in support of the petition for writ of error.

Copy of prayer for reversal.

Copy of assignments of error in Supreme Court of the United States.

A. C. GRIMM, *Att'y.*

343 *Document No.* 12.

Filed December 20, 1913. S. E. Cleage, Clerk Supreme Court of Tennessee.

To the Honorable the Supreme Court of the United States:

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

And now comes Southern Railway Company, the plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the state of Tennessee, pronounced on the 22d day of October 1913, while in session at Knoxville in said state in the cause above entitled, then pending in said court, by which a judgment was pronounced

in favor of the defendant in error, D. E. Crockett, and against the Southern Railway Company, plaintiff in error, in the sum of One Thousand Sixty Dollars & Seventy-seven cents ($1060.77), together with all the costs of said cause. Said reversal is prayed for upon the grounds set forth in the assignments of error hereto annexed.

L. D. SMITH,
Attorney for Southern Railway Company,
Plaintiff in Error.

344 *Document No.* 13.

Filed December 20, 1913. S. E. Cleage, Clerk Supreme Court Tennessee.

To the Honorable the Supreme Court of the United States:

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. E. CROCKETT, Defendant in Error.

And now before the Justices of the Supreme Court of the United States of America at the capitol in the city of Washington, comes the Southern Railway Company, plaintiff in error, by its counsel in the above stated case, and assigning errors therein says:

In the record and proceedings of the aforesaid cause there is manifest error in this, to-wit:

The Supreme Court of Tennessee filed no written memorandum or opinion in rendering its final judgment and decree in this case, but merely affirmed the judgment of the Court of Civil Appeals.

But in affirming said judgment the Supreme Court of Tennessee must have necessarily held:

(1) Either that the Employers' Liability Act of Congress abolished the decree of assumption of risk;

(2) Or that the Safety Appliance Acts of Congress required at the time of the injury sustained by the defendant in error the Southern Railway Company to have the drawbars of its switch engines comply with the standard height prescribed by the Interstate Commerce Commission for freight cars.

1. The Supreme Court of Tennessee therefore was in error in holding that the Employers' Liability Act abolished the defence of
345 the assumption of risk. The common law rule, under which the defendant in error would not be entitled to a recovery in this case by reason of the fact that he knew before hand, and at the time of his injuries of the very defective conditions, which he says contributed to his injuries, is not changed by the Federal statute referred to, unless the defect was one prohibited by some statute enacted for the safety of employees.

2. The only statute invoked as being applicable to the situation here enacted for the safety of employees is the statute known as the Safety Appliance Act, an act which *was* in force at the time of the accident in this case, did not require interstate carriers to have a

standard height of drawbars on its switch engines. The requirement of the standard height drawbars for freight cars is, and was not applicable to switch engines. Therefore, the Safety Appliance Act, not having been violated in this case, the defendant in error having full knowledge of the defective conditions, and continuing his employment with the full appreciation of the danger, assumed the risk, and was not under that state of facts entitled to any recovery. The Supreme Court of Tennessee was in error in holding otherwise. It should have held that the motion made by the petitioner, Southern Railway Company, in the Circuit Court for peremptory instructions was well taken; or if there was any evidence tending to show that Crockett did not know of the defects, and appreciate the dangers incident thereto, then the court should have reversed the judgment of the Circuit Court, and of the Court of Civil Appeals for the failure of the trial judge to instruct the jury upon the assumed state of facts, which unquestionably there was proof tending to
346 show, and should have directed a new trial so that the correct interpretation of the law could have been given in charge to the jury.

3. Plaintiff in error, says that the judgment and decision of the Supreme Court aforesaid is repugnant to, and in conflict with the laws of the United States, and especially those several Acts of the Congress of the United States, commonly called the Federal Employers' Liability Acts, and the Federal Safety Appliance Acts; and by holding and adjudicating as aforesaid, the said Supreme Court of the state of Tennessee erroneously construed the said laws of the United States, and thereby denied plaintiff in error rights, privileges and immunities to which it was entitled thereunder.

Wherefore, Southern Railway Company, plaintiff in error, as aforesaid prays for the reversal of said judgment.

L. D. SMITH,
Attorney for Southern Railway Company,
Plaintiff in Error.

347 *Document No.* 14.

Certificate of Lodgment.

SUPREME COURT,
State of Tennessee, ss:

I, S. E. Cleage, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on December 15, 1913, in the matter of Southern Railway Company versus D. E. Crockett:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one for file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Knoxville, Tennessee, this December 15, 1913.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk Supreme Court of Tennessee.

348 *Document No.* 15.

Supreme Court for the Eastern Division of Tennessee, at Knoxville.
S. E. Cleage, Clerk. Jas. T. Joy, Deputy Clerk.

Execution Docket No. —.

SOUTHERN RAILWAY CO.
vs.
D. E. CROCKETT.

Cost Bill.

Costs and Judgment Adjudged against Southern Railway Co. on the 16 Day of October 1913.

Costs in the Circuit Court of Knox County, Tenn., (as certified)	$70.35
Cost Court of Civil Appeals 9.35 Supreme Court 18.10 State Tax 5.00 and Clerk's fee	32.45
Transcript Cost of the Lower Court J. A. Wrinkle Clerk	54.35
Amount of Recovery Oct. 16, 1913	1,060.77

Transcript for Supreme Court of United States (paid by Southern Ry. Co. $101.60)
(Filing papers & Seal 9.50 paid by Southern Ry. Co.)
Add interest on Recovery from —— to date of settlement ——.

I certify the foregoing to be a correct statement as taxed.
S. E. CLEAGE, *Clerk.*

349 *Authentication of Record.*

SUPREME COURT,
State of Tennessee, ss:

I, S. E. Cleage, clerk of said court, do hereby certify that the foregoing papers, numbered from 1 to 15, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of D. E. Crockett, plaintiff, versus Southern Railway Company, defendant, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Knoxville, Tennessee, this December 20, 1913.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk Supreme Court of Tennessee.

350 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Tennessee, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Tennessee, in the City of Knoxville, Tennessee, this December 20, 1913.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk Supreme Court of Tennessee.

Endorsed on cover: File No. 23,977. Tennessee Supreme Court. Term No. 826. Southern Railway Company, plaintiff in error, vs. D. E. Crockett. Filed December 24th, 1913. File No. 23,977.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 826.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. E. CROCKETT, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

L. E. JEFFRIES,
L. D. SMITH,
Attorneys for Plaintiff in Error.

INDEX.

List of Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

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SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. E. CROCKETT, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

I.

Statement of the Case.

This is a civil action instituted in the Circuit Court of Knox County, Tennessee, to recover damages for personal injury to the defendant in error, D. E. Crockett, which was alleged to have been caused by the wrongful act and negligence of the plaintiff in error, the Southern Railway Company.

Judgment was rendered in said court in favor of defendant in error for $1,000.00, with interest and cost, which judgment was affirmed by the Court of Civil Appeals of Tennessee. A petition for a writ of certiorari was presented to the Supreme Court of Tennessee and disallowed by it, without expressing any formal opinion, and final judgment was pronounced against the plaintiff in error for the amount of judgment and cost.

The case is brought here by the Southern Railway Company, claiming that this judgment is erroneous and inconsistent with the provisions of the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and with the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," passed March 2, 1893, and the amendments thereto, passed March 2, 1903, and April 14, 1910, enacted in pursuance of article 1, section 8, clause 3 of the Constitution of the United States, and that said judgment deprived the plaintiff in error of rights, privileges and immunities to which it is entitled under said article of the Constitution of the United States and the provisions of the said Acts.

The Tennessee courts held that the Safety Appliance Acts were applicable to the present case,

and that thereby the doctrine of assumption of risk was not available as a defense, whereas the plaintiff in error claims that the doctrine applies and that the judgment rendered operates as a denial of rights under the Federal Constitution and Acts.

The facts, so far as material, are as follows:

The defendant in error, D. E. Crockett, brought this suit in the Circuit Court of Knox County, Tennessee, to recover damages for personal injuries alleged to have been sustained by him while he was employed by the plaintiff in error, Southern Railway Company, as a switchman in its yards, on October 15, 1910. He recovered a verdict and judgment in the circuit court for $1,000.00.

The declaration stated the defendant in error's cause of action in three counts, the only material difference in the three counts being that in one of them his right to recovery was based upon the Federal Employer's Liability Act, it being alleged that the railway company was an interstate carrier by railroad, and the defendant in error was in its employment and engaged at the time he was injured in the movement of interstate commerce.

While the declaration alleged various kinds of defects and deficiencies in the cars and in the track, the only negligence which the proof tended to show was that the drawbar of the engine was too low and the track was in bad condition.

The facts immediately connected with the accident established that the defendant in error had been in the service of the plaintiff in error at its

Coster Yards, at Knoxville, Tennessee, as switchman since May, 1906, when, on October 15, 1910, while still so engaged, he received the injuries complained of. On the last-named date, while engaged in making up a freight train, an engine with a freight car attached was being moved down grade towards where some other freight cars were standing on the track, when the car which was attached to the engine became detached or uncoupled, and being propelled by gravity on toward the other cars standing on the track it came in contact with them; and Crockett, being on the car which became uncoupled, was by the impact, as he claims, thrown against the brake and injured. He insisted, and offered evidence tending to show, that the car was caused to become detached from the engine by a defective track at that point and an insufficient drawbar on the engine. He testified, and offered other testimony tending to show, that the ground on which the track was laid at the point where the car became detached was wet and marshy and the ties were broken and insufficient, so that the track was uneven and rough, and as a result the car and engine attached to it were made to alternately go up and down at the ends where they were coupled together as they passed over the defective track; and tending to further show that the drawbar on the engine which was used in coupling the car to the engine was not over two and one-half feet, or thirty inches high, measured from the center of the track to the center of the knuckle of the drawbar,

and that because of these conditions operating together the car was caused to become detached. On the other hand there was evidence offered by the plaintiff in error tending to show that neither of these defects existed, but that both the track at the point in question and the drawbar on the engine were in proper condition.

The evidence in the circuit court conclusively showed, and the Court of Civil Appeals so found, that Mr. Crockett knew of the defective condition of the track and of the drawbar of the engine before he engaged in the service in which he was injured. He admitted in his testimony that he knew these conditions; that he had passed over this very same track frequently with the engine involved in this case, and that the cars had been becoming detached from the engine prior to the accident, several times on the day before.

The Court of Civil Appeals approved the judgment of the lower court and held that the proof tended to show that the drawbar of the switch engine that was being used in the movement of these cars at the time Crockett was injured was less than thirty-one and one-half inches high, measured from the top of the rail to the center of the drawbar, and that the Federal Safety Appliance Acts at that time required the railway company to have the drawbars on its switch engines not less than thirty-one and one-half inches in height, and therefore under the Federal Employer's Liability Act Crockett did not assume the risks incident to the

defective condition of the drawbar, although he knew of this defective condition; the Employer's Liability Act providing on its face that in an action brought against any common carrier under the provisions of the act for injuries to any of its employes, such employes shall not be held to have assumed the risk of their employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employes.

This ruling was approved by the Supreme Court of Tennessee, and a writ of error was allowed to this court to review this judgment.

II.

Assignments of Error.

Upon the trial of the cause in the lower court the plaintiff in error requested the trial court, first, to give peremptory instructions in its favor on the ground that if the coupling was defective the defendant in error had assumed the risk as a matter of law, and, second, if the court felt that peremptory instructions should not be given that it submit to the jury a proposition defining the law relating to the assumption of risk. The court refused both requests, taking the view that the provisions of the Safety Appliance Acts relating to the drawbars applied to freight engines as well as to freight

cars. To these rulings of the court error was assigned.

It is respectfully submitted that the Court of Civil Appeals was in error in holding that the Federal Safety Appliance Statute, at the time of the injury complained of, October 15, 1910, prohibited the railway company from using a switch engine with the drawbars less than thirty-one and one-half inches in height, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, and therefore in holding that the defendant in error did not assume the risks incident to the defective conditions which he knew to exist. As there was no dispute in the evidence that he did know of these defects and fully appreciated the danger incident to service in connection therewith, the suit of the defendant in error should have been dismissed, plaintiff in error having in the court below made a motion for peremptory instructions based upon this ground.

III.

The Federal Question in the Case.

The first ground of the motion, which is to dismiss the writ of error, because the petition upon its face shows that the court is without jurisdiction to hear and determine it, necessarily assumes that the case was erroneously decided by the Supreme Court of Tennessee, and that the plaintiff in error,

the Southern Railway Company, was held liable for the payment of damages to the defendant in error alone by reason of an erroneous interpretation and construction by the State court of the United States statutes known as the Employers' Liability Act and the Safety Appliance Acts. In other words, the petition shows that if the State court had given to those statutes the correct interpretation, there could not have been, or at any rate there might not have been, any liability upon the part of the plaintiff in error. The argument is that this erroneous interpretation by the State court of these Federal statutes did not deny to the plaintiff in error any right, title, privilege or immunity to which it was entitled thereunder within the provisions of section 237 of the Judicial Code (section 709, Revised Statutes).

The argument and brief in support of the motion evidently overlooks, since it does not refer to, the latest decisions of this court on questions in cases of this kind.

The case of *St. Louis, I. M. & S. R. Co. vs. Taylor,* 210 U. S., 281, is directly in point on this question. In that case the only Federal question involved was whether or not the State court had properly construed the Safety Appliance Statutes with respect to the height of drawbars for freight cars, and that is the question involved in the present case.

The contention was made in the Taylor case, as it is here, that the plaintiff in error, merely from

the fact that an erroneous interpretation of the law had been given by the State court, was not denied any right, title, or immunity under the Federal statute. Justice Moody, speaking for the court, stated the rule for determining this question, and applied it to the facts of that case, to be:

> 'Congress has regulated and limited the appellate jurisdiction of this court over the State courts by section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. The words of that section material here are those authorizing this court to re-examine the judgments of the State courts 'where any title, right, privilege, or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed * * * under such * * * statute.' There can be no doubt that the claim made here was specifically set up, claimed and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick vs. Market Nat. Bank,* 165 U. S., 538; 41 L. Ed., 817; California Nat. Bank *vs.* Kennedy, 167 U. S., 362; 42 L. Ed., 198; 17 Sup. Ct. Rep., 831; San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; 47 L. Ed., 765; 23 Sup. Ct. Rep., 487; Nutt *vs.* Knut,

200 U. S., 12; 50 L. Ed., 348; 26 Sup. Ct. Rep., 216; Rector *vs.* City Deposit Bank Co., 200 U. S., 405; 50 L. Ed., 527; 26 Sup. Ct. Rep., 289; Illinois C. R. Co. *vs.* McKendree, 203 U. S., 514; 51 L. Ed., 298; 27 Sup. Ct. Rep., 153; Eau Claire Nat. Bank *vs.* Jackman, 204 U. S., 522; 51 L. Ed., 596; 27 Sup. Ct. Rep., 391; Hammond *vs.* Whittredge, 204 U. S., 538; 51 L. Ed., 606 ; 27 Sup. Ct. Rep., 396. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicity conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.

"It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the Act, which warranted on

> the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here."

This interpretation of section 709 of the Revised Statutes was again followed by this court in an opinion delivered by Justice Lurton in the case of *Seaboard Air Line Railway vs. Duvall,* 225 U. S., 477. In that case the Federal question relied upon to sustain the jurisdiction of the court, concerned the construction and application of the Employers' Liability Act. It was an action to recover damages for personal injuries, and the complaint of the plaintiff in error to the action of the State court was that the Federal statute had been made to apply to a case in which it was not applicable. In the opinion of Mr. Justice Lurton it is said:

> "This case does not come here from a Federal court, and we are therefore not a court of general review. It comes under section 709, Rev. Stat., and the power to review a judgment of a State court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, 'where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute * * * and the decision is against the title, right, privilege, or immunity specially set up or claimed * * * may be re-examined and reversed. * * *'
>
> "This action was brought under an Act of Congress. If the act has been erroneously construed and exceptions saved, or if a par-

> ticular construction to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court."

Further in the opinion the court quoted with approval from the Taylor case just above referred to.

Later on in *St. Louis, Iron Mountain & Southern Railway Company vs. McWhirter,* 229 U. S., 275; 57 L. Ed., 1179, this question of the court's jurisdiction in a case of this kind was raised. It arose upon a motion made by the plaintiff in error at the close of the evidence, requesting the court to instruct the jury to find in its favor, and it was contended that the action of the State court in overruling this motion did not bring the case within the jurisdiction of the Supreme Court. Mr. Chief Justice White, in the written opinion for the majority of the court, in stating and deciding the question presented, said:

> "We must first dispose of a motion to dismiss which was made and postponed to the hearing of the merits. It rests upon the ground that the case as made by the pleadings presented two distinct causes of action,—one at common law, irrespective of the statutes of the United States, and the other under those statutes; and that the former cause of action was sustained and affords a basis broad enough to support the judgment irrespective of what may have been decided concerning the statutes of the United States. The contention wants foundation in fact.

As we have seen, the pleadings in express terms exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a State court, our power to review is controlled by Rev. Stat., section 709, U. S. Comp. Stat., 1901, p. 575, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, *the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result.* Seaboard Air Line R. R. Co. *vs.* Duvall, 225 U. S., 447; 56 L. ed., 1171; 32 Sup. Ct. Rep., 790; St. Louis, I. M. & S. R. R. Co. *vs.* Taylor, 210 U. S., 281; 52 L. ed., 1061; 28 Sup. Ct. Rep., 616. And of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. Swafford *vs.* Templeton, 185 U. S., 487; 46 L. ed., 1005; 22 Sup. Ct. Rep., 783. If, as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer, for the purpose of establishing that even if

a Federal question was passed upon, the case was also decided on an independent non-Federal ground, broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in Neilson *vs.* Lagow, 12 How., 98; 13 L. ed., 909, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a State court where it has decided a Federal question can be rendered unavailing by a suggestion "that the court below may have rested its judgment" on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this: that the power to review a Federal question which has been expressly decided by a State court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to go the jury to show liability under the Fed-

eral law. While it is true, as we have said, that, coming from a State court, the power to review is controlled by Rev. Stat., section 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. Kansas City So. Ry. Co. *vs.* C. H. Albers Commission Co., 223 U. S., 573, 591; 56 L. ed., 556, 565; 32 Sup. Ct. Rep., 316; Creswill *vs.* Grand Lodge K. P., 225 U. S., 246; 56 L. ed., 1074; 32 Sup. Ct. Rep., 822."

It is worthy of note that in the case of McWhirter the argument presented in the brief in support of the motion in this case was presented with all the logic that could be brought to its support in a dissenting opinion by Mr. Justice Pitney. The views of Mr. Justice Pitney not being concurred in by the majority, we take it it may be safely assumed that the reverse is the settled law of this court. It was likewise decided in *St. Louis, S. F. & T. R. R. Co. vs. Seale,* 229 U. S., 156, in an opinion by Mr. Justice Van Devanter. The question involved in that case was whether or not under the Federal Employers' Liability Act a suit could be maintained by the beneficiaries, or whether it must be brought and prosecuted by the administrator.

The effect sought to be given in the brief in support of the motion of this case to the opinion of

this court in the case of *Kizer vs. Texarkana & Fort Smith Ry. Co.*, 179 U. S., 199, was disaffirmed by this court in the case of *Nutt vs. Knut*, 200 U. S., 18. In that case Mr. Justice Harlan, speaking for the court, said:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the State courts was involved. We preceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not now stop to examine those cases narrowly, and to declare wherein they may be in conflict with the cases above cited. Suffice it to say that, upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question of jurisdiction now before us, we reaffirm the views expressed in the above cited cases, as demanded by the statutes regulating the jurisdiction of this court.

We submit, therefore, that the foregoing decisions of this court are ample to justify it in assuming the jurisdiction of this case and determining the questions involved upon their merits.

IV.

Correctness of Decision of State Court.

The next ground of the motion is that the case should be affirmed and not kept upon the docket for further argument, because the decision of the State court is so manifestly right.

This ground of the motion cannot, of course, be decided except upon an examination of all the questions involved upon their merits. And, whether the case is heard upon full argument or not, it cannot be decided without a full examination of all the questions presented. The interpretation of the Employers' Liability Act and the Safety Appliance Statutes in the respect involved in this case, is of the greatest importance, and in order to a proper and correct determination it is necessary to know the facts of the case and the exact propositions of law involved.

1. *Propositions of Fact.*—(1) It is undisputed in this record that the plaintiff below had full knowledge of the existence of the defects, which he claimed to have contributed to his injuries, before and at the time he went to work with them, and that he appreciated the dangers incident to working therewith.

(2) If not established beyond controversy, there was certainly evidence tending to show the fact to be, that the plaintiff below had full knowledge of

the existence of the defects, which he claimed to have contributed to his injuries, before and at the time he went to work with them, and appreciated the dangers incident to working therewith.

2. *Propositions of Law.*—(1) Crockett, the plaintiff below, having full knowledge of the defects, and appreciating the dangers incident thereto, assumed the risk of injury, and was therefore not entitled to any recovery. The fact that he was employed at the time by an interstate carrier in interstate commerce, and thus leaving his rights and the railroad company's liability to be governed by the Employers' Liability Act, does not affect the question, because that Act does not abolish the defense of the assumption of risk, except where the violation of any statute enacted for the safety of employees contributed to the injury.

(2) The only defect claimed to have existed in this case, and prohibited by the Safety Appliance Act, is that the drawbar of the switch engine, which was engaged in switching the cars, upon which he was injured, was lower than the standard height of drawbars provided by the Interstate Commerce Commission for freight cars. That requirement does not apply to switch engines. A switch engine is not a freight car within the meaning of the Act and the resolution of the Interstate Commerce Commission.

ARGUMENT.

(1) We may properly consider first the construction of the Safety Appliance Acts, inasmuch as their construction against our contention is determinative of the case.

(*a*) Did the Safety Appliance Acts in force at the time of the injury involved in this case, require of railroad companies the duty of having the drawbars on switch engines at a minimum height of thirty-one and one-half inches above the level of the tops of the rails?

Section 5 of the Safety Appliance Act, approved March 2, 1893, amended April 1, 1896, is as follows:

> "SECTION 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission

> may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

While there is no evidence of the fact in this record, the American Railway Association, pursuant to the above provisions of the Safety Appliance Act, on June 6, 1893, adopted and certified to the Interstate Commerce Commission, the following resolutions:

> "(1) Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for standard-gauge railroads in the United States, shall be thirty-four and one-half inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be three inches."
>
> "(2) Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for the narrow-gauge railroads in the United States shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches." Thornton, 147.

Reading this statute in connection with the resolution of the American Railway Association, it is scarcely conceivable that the provisions of the act relating to the height of drawbars could be made to apply to switch engines. Indeed the Court of Civil Appeals concedes as much and finds it necessary, in order to reach its conclusion, to resort to other acts and provisions relating to safety appliances.

The view taken by the Court of Civil Appeals, which is the strongest that can be urged in favor of their position, may best be stated in the language of the opinion delivered by Justice Hughes:

> "By referring to that part of the fifth section of the Safety Appliance Act hereinbefore copied it is seen that it applies to and regulates the standard height of drawbars for 'freight cars,' and likewise that the order of the Interstate Commerce Commission in like manner applies to the height of drawbars for 'freight cars'; and it is clear, a strict construction of these terms might well so limit them as to exclude locomotives, but by reference to that portion of the amendment of the Safety Appliance Act passed in 1910, hereinbefore copied, it will be seen that the Interstate Commerce Commission is there given authority to modify or change the standard of heights on drawbars and to fix a time within which such modification or change shall become effective, and that prior to the time so fixed it is declared that 'it shall be unlawful to use any car or vehicle,' etc., which does not com-

> ply with the standard so prescribed. And again it is provided in the same connection that 'after the time so fixed it should be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard prescribed by the commission.' The very use of the term car or vehicle would indicate that more than the car is meant to be included. But this is not all, nor even the most forceful or convincing provision of the Safety Appliance Act. By reference to that part of the amendatory act passed in 1903 it is provided that the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad, etc. Here is the express direction that the act regulating the height of drawbars shall be held to apply to locomotives." (Opinion, pp. 6 and 7.)

As said in the opinion of the Court of Civil Appeals, the act of 1893, and the resolution of the American Railway Association in pursuance thereof, only purports to regulate the height of drawbars for freight cars. The term "freight cars" is so universally known to describe a particular kind of car that it hardly seems possible for it to be construed to mean a switch engine. Undoubtedly a freight car is not any kind of a car. For example, it is not a passenger car. It is a particular kind of a car. One told to observe a freight car would hardly expect to see a switch engine.

Webster in his dictionary gives what everybody

knows to be a correct definition of a freight car. He says it is "A railroad car especially designed for holding freight." He defines "freight" to be, "the cargo or any part of the cargo of a ship or railroad car; lading; that which is carried by water or by land; as 'the freight by the company was mostly wheat'; 'the schooner's freight was coal; a freight train; loaded with passengers and freight.'"

The Encyclopædia Brittanica, under the title of "Railroads in the United States," in discussing the different kinds of cars used in railway service, divides them into locomotives, passenger cars and freight cars. Of freight cars it is said:

> "Freight cars of today are from thirty-four to forty feet in length, weight 29,000 to 36,000 pounds and carry loads from 60,000 to 70,000 pounds, the 60,000 pound car being now considered the standard."

In variety, freight cars are especially adapted to many uses. There are now ventilated refrigerator cars for the transportation of fruits, vegetables, fresh meats and other perishable goods; cattle cars with arrangements for watering and feeding stock while in transit; single and double deck cars for sheep and hogs; improved box cars for general merchandise; special cars for furniture and other light-bulk freight; improved flat cars for lumber and stone; double and single hopper-bottom cars for coal, crushed stone, etc., and special cars for

ores, of which the heavier ones are often lined with iron plates. There are poultry cars, in which birds are fed and watered. Other special cars are caboose cars, horse cars, coke cars, barrel cars, as well as flat cars from 60 to 70 feet in length, upon which street cars are to be shipped." Enc. Brit., vol. 28, p. 537.

Congress is presumed to have used this term in its common acceptance. We might as well say that Congress in requiring that locomotives should be equipped with the power driving wheel brake system, intended the term locomotive to apply to freight cars, as to say that the provisions with respect to the height of drawbars for freight cars applied to locomotives.

That Congress did intend in referring to freight cars to mean the kind of cars which the words described, and which they are commonly accepted to mean, becomes manifest when we consider in connection therewith the further provision found in the same section and following immediately after the language conferring authority on the Interstate Commerce Commission to designate the standard height of drawbars for freight cars, to-wit:

> "And shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars."

Thus showing that the car which was to have a standard height, was a car which would sometimes

be empty and sometimes loaded. A freight car is a car upon which freight is loaded for carriage and from which freight is unloaded when it is no longer to be carried. Nobody ever heard of a loaded switch engine, nor an empty switch engine. Switch engines are not used for the purpose of being loaded with freight. A passenger car might be referred to as being empty or loaded. The very construction of a locomotive contradicts the idea that the statute was intended to embrace a switch engine within the meaning of the term "freight car." The drawbar of a freight car is attached to the body of the car, which is built up on trucks somewhat like the bed of a wagon, and is on springs. When the car is loaded the body is pressed downward and thereby the drawbars are brought nearer to the level of the rails, hence the necessity for the provision fixing a variation in the maximum height of empty and loaded cars. Such is not the case with the switch engine. The drawbar is attached to the pilot beam, and its height from the rails remains the same so far as being affected by a load is concerned. The engine is the instrument which carries the power. It is never used for the purpose of carrying freight. To say that a switch engine is a freight car, is to do violence to men's understanding of the meaning of terms.

(*b*) *Is a Switch Engine a Freight Car?*—But let us see whether this same and common under-

standing of the term "freight car" can be stretched to include a switch engine by the considerations referred to in the opinion of the Court of Civil Appeals.

(1) It is said that in the opinion of the Supreme Court of the United States, in the case of Johnson *vs.* Railroad Company, 196 U. S., 1; 49 L. Ed., 363, in construing section 2 of the Safety Appliance Act of 1893, a locomotive was held to be a car, and that said section in making it unlawful for a common carrier to haul or use on its line "any car" not equipped with couplers coupling automatically by impact, prohibited the use of locomotives not so equipped.

An examination of the case, we think, will sufficiently answer the argument on this point. The Supreme Court was dealing with a case which involved the failure of a railroad company to equip its locomotives with couplers coupling automatically by impact. The plaintiff in that case had been injured by reason of having to make a coupling of an engine not so equipped.

In order that the exact words of the section involved in that case may be immediately before the court, we quote it:

> "SEC. 2. That on and after the first day of January, 1893, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car in moving interstate traffic not equipped with couplers coupling automatically by impact,

> and which can be uncoupled without the necessity of a man going between the ends of the cars."

It is to be noted that this provision embraces "any car" which of course, means all cars, and the question presented to the Supreme Court was not whether a locomotive was a freight or a passenger car, but whether it was a car at all.

On this point the court said:

> "And manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions, and by many judicial decisions, some of them having been rendered in construction of this act."

The effort of the counsel for the railway company in that case was to give the term "any car" a restricted meaning. It could not be denied that the words "any car," by their general meaning would embrace a locomotive, so it was contended that the words could not embrace locomotives because locomotives were elsewhere in terms required to be equipped with power driving wheel brakes, and that the rule, "the expression of one thing excludes another," applied. In other words, it was argued that because section 1 of the act required locomotives to be equipped with a certain

kind of appliance, section 2, therefore, referred to other kinds of cars than locomotives. But this argument was answered by the fact that it was not only proper for a locomotive to be equipped with a train brake system, but the same reasons applied for equipping locomotives with the safety coupling appliances, and, the object of the act being the protection of employees, a narrow construction would not be adopted so as to exclude from the provisions of the act some of the instrumentalities clearly embraced within the meaning of the general terms used. In determining whether the legislature intended a limited and restricted meaning to be applied to the words used, the court could properly look to the general intention and purpose of the act.

But this reasoning does not apply to the provision with respect to the standard height of freight cars, for the reason that Congress used words of restricted and well-known meaning. It might be conceded for the sake of argument that there was just as much reason for having the drawbars of a locomotive of a standard height as existed for freight cars, but it is the intention of the act that we are to arrive at, and since the Congress has used language which clearly defines the particular kind of a car intended to be embraced by the provisions, there is no occasion for resort to the general need which might exist for the kind of legislation not covered by the manifest meaning of the language used. Suppose Congress had said

any freight car painted black should be equipped with drawbars of a certain height. Of course there is the same need for a freight car painted white to be so equipped, but no one would say that Congress meant a white car when it said a black car, merely because there was the same need of the provision for white as black. This would indeed be making black look white.

This interpretation of the statute becomes more manifest, if possible, when we bear in mind that section 2 of the act which was under construction in the Johnson case, in defining the kind of cars to which the automatic couplers applied, used the general and broad term "any car"; whereas in the same act, when the Congress undertakes to fix the standard height for drawbars, it specifies the particular kind of car, using the term "freight car." By section 1, the kind of car that was to be equipped with automatic couplers was "any car" or all cars, whereas by section 5 the kind of a car on which the height of drawbars was regulated was a freight car.

The controlling thought in the opinion in that case is that all the consideration, including the object and purpose of the statute, the necessities for the particular appliance, and the general meaning of the term, went to show that Congress, in using the words "any car" used them in a very broad and generic sense and meant thereby to include all kinds of cars which run on the rails, and therefore necessarily included locomotives.

This same argument was urged in this court in *Pennell vs. Philadelphia & Reading Ry. Co.*, decided January 5, 1914. In that case it was urged that the failure to have automatic couplers between the locomotive proper and the tender, constituted a violation of that provision of the act which made it unlawful to haul, or permit to be hauled, any car not coupled with an automatic coupler, etc. The argument urged for making this statute apply to the coupling between the locomotive and the tender was that the primary object was to promote the safety of employees and travelers upon railroads, and that therefore the mere absence of an automatic coupler was sufficient to make a case of liability. Without deciding whether or not the act was as broad in its purposes as was contended for, the court held that the construction of the act was the main concern and that "we are brought to the question, is the tender of a locomotive a car within the meaning of the statute"?

So it is that other considerations enter into the construction of the statute than the mere purposes of the act. In other words, the courts cannot write into the statute a provision which the Congress did not write, merely because the general objects and purposes of the act would justify or call for just such a provision, and so it was held in the Pennell case that the end of the tender next to the engine was not a car within the meaning of that provision, which requires all cars of all kinds to be equipped

with automatic couplers. The Pennell case is of importance upon other aspects of the case to be hereinafter considered.

(c) *The Words "All Cars" in Section 2 Not Applicable to Height of Drawbars.*—Another suggestion made by the Court of Civil Appeals in support of its opinion is that by section 2 of the act of 1893, it is made unlawful for any common carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in interstate traffic not equipped with couplers," etc. With respect to this the court says in its opinion:

> "Here is the use of the word 'cars' alone rather than the term 'freight cars' as found in the fifth section, and the order of the Interstate Commerce Commission hereinbefore set out."

It will be seen that in the opinion of the Court of Civil Appeals the words "to haul or permit to be hauled or used on its line, any car used in interstate traffic not equipped with couplers," are between quotation marks. The quotation is taken from the second section of the Act of 1893. If the judge had quoted the balance of the sentence instead of substituting the letters "etc," it would have instantly occurred to him that that section had no application whatever to the height of drawbars.

We have had occasion heretofore in this brief to quote this section, and it is only necessary here to call attention to the fact that it is made unlawful

thereby for any common carrier to haul or use any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars. It is true that this section uses the term "any car," but when the quotation is completed it is seen that the prohibition is against the use of "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It is so manifest that the court in referring to this section of the Act overlooked its application alone to coupling appliances that it has occurred to us that the court may have intended to quote from section 2 of the Act of 1910. If so, the quotation when completed is equally unfortunate for the position sought to be illustrated. Section 2 of the Act of 1910 makes it unlawful for a common carier to haul or use on its line any car subject to the provisions of this Act not equipped with the appliances provided for in this Act, to wit:

> "All cars must be equipped with secure sill steps and efficient hand-brakes; all cars requiring secure ladders, secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders should also be equipped with secure hand-holds, or grab-irons on their roofs at the tops of such ladders."

So it will be seen that neither section 2 of the Act of 1893 nor section 2 of the Act of 1910 has any application whatever to the requirement for a standard height of drawbars, and, instead of showing that the provision with respect to the standard height for the drawbars of freight cars is applicable to all kinds of cars, it shows the very reverse, because, in referring to such equipment as automatic couplers, ladders, running boards, etc., the Congress used the generic term of "any car," whereas in relation to the height of drawbars it used the restricted term "freight cars," thus making manifest that the Congress intended to make a distinction between freight cars and other kinds of cars.

(*d*) *Effect of the Act of* 1910.—Another suggestion of the Court of Civil Appeals is that the Act of 1910, which is primarily an Act for the purpose of requiring all cars to be equipped with secure hand-holds, running boards, etc., at the end of section 3 gives authority to the Interstate Commerce Commission to modify or change and to prescribe the standard height of drawbars, and fix the time within which such modification or change shall become effective and obligatory. But it is the concluding part of that provision to which the Court of Civil Appeals calls attention as having the effect to extend the regulations of the Commission to every kind of cars, to wit:

> "And prior to the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed, or the standard so prescribed, and after the time so fixed, it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

It is to be borne in mind that the Act of 1910, which was passed April 14 of that year, did not become effective until December 31, which was after the accident involved in this case. The Interstate Commerce Commission, on the 10th of October, 1910, passed the following resolution with respect to the standard height of drawbars:

> "It is ordered, That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the center of drawbars for standard-gauge railroads in the United States subject to said Act shall be thirty-four and one-half inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be thirty-one and one-half inches, and on narrow-guage railroads in the United States subject to said Act the

maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be twenty-six inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be twenty-three inches, and on two-foot-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be seventeen and one-half inches and the minimum height of drawbars for freight cars on such two-foot-gauge railroads measured in the same manner shall be fourteen and one-half inches.

"And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910."

This Act of 1910 only made it unlawful to use a car that did not comply with the previous regulations of the Interstate Commerce Commission. The statute does not change or enlarge the scope of the regulations which had previously been made. The Commission had only prescribed the regulations with respect to the height of drawbars for freight cars, and it was only such cars that by this Act it was made unlawful to use.

It will be noted that the Act of 1910 and the order of the Interstate Commerce Commission entered in 1910 became effective after the date of Crockett's injury, and hence have no application to this case.

The whole clause gets right back to the original

Act of 1893 and the order of the Interstate Commerce Commission issued in pursuance thereof. It is true this provision makes use of the general term "any car or vehicle," but the context shows that the car or vehicle referred to was such car as did not comply with the standard previously prescribed by the Commission, and when we look back to what the Commission had done we find that it had prescribed a standard for freight cars merely.

This suggestion of the Court of Civil Appeals makes it necessary to examine the whole Act of 1910, and in connection therewith the resolution of the Interstate Commerce Commission in pursuance thereof. The view taken by the Court of Civil Appeals is that because the Act, in referring to the various equipments required by it and the Act of 1893, groups the appliances and vehicles to which they are to be applied, and in general terms provides that all the vehicles must be equipped with all the appliances; that therefore, every car of every kind must be equipped with every kind of appliance referred to in the Act.

The first section of this Act provides that its provisions shall apply to every vehicle subject to the Act of March 2, 1893, and to the amendments of 1896 and 1903, commonly known as the "Safety Appliance Acts." This section taken alone would require every car without reference to its kind, which would include locomotives and flat cars, to be equipped with running boards and ladders,

whereas, when the second section of the act is examined, it will be found that running boards and ladders are to be applied only to cars which require ladders and running boards; so that, in order to determine what vehicles any particular appliance is to be equipped with, we must ascertain what particular appliance has been provided for the particular vehicle, and of course if all cars are required to have a particular appliance, then this Act requires all cars to have that particular appliance; but if a particular kind of car is required to have only a particular kind of appliance, then this Act only required that all vehicles of that kind shall be equipped with the particular appliance provided by the Act for it. To illustrate: The previous Act had made it unlawful to use any car not equipped with automatic couplers; the Act of 1910, makes that provision apply to all cars, whether engaged in interstate service or not, and it makes no difference whether the car is a flat car or a locomotive, it must be equipped with the automatic coupler. As the Act does not designate ladders and running boards except on such cars as require ladders and running boards, the object of the provision is to have all cars which do require ladders and running boards to be equipped with such ladders and running boards.

Section three authorizes the Interstate Commerce Commission to designate the number, dimensions, location, and manner of application of the various appliances required by the different Safety

Appliance Acts, and provides that the standard of equipment prescribed by the Commission shall be used on all cars subject to the provisions of the Act. By the interpretation sought to be applied by the Court of Civil Appeals, each and every car would have to be equipped according to the standard prescribed by the Interstate Commerce Commission for every kind of a car. This provision simply means that every car for which the Commission established a particular standard of equipment shall comply with that standard of equipment. It certainly does not mean that a car must have the equipment provided by the Commission for other cars where that equipment is not required for the particular car.

Section five provides that nothing in the Act shall be construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from the provisions, powers, duties, liabilities, or requirements of the Safety Appliance Acts. This provision certainly does not mean to impose upon the Interstate Commerce Commission the duties which the Act had imposed upon the common carrier, nor, *vice versa*, to impose upon the common carrier the powers, duties, liabilities, or requirements of the Interstate Commerce Commission or the United States Attorney. The rule of interpretation adopted by the Court of Civil Appeals would construe this Act as imposing upon the carriers the powers and duties of the Interstate Commerce Commission,

and would require the United States attorney to perform the duties imposed upon the common carrier.

These suggestions, it seems to us, conclusively show that a proper construction will not extend the requirement for appliances to cars not specifically required to have the appliances, and that the purpose of the statute is to bring within the purview thereof all cars of all kinds, applying to every car of a particular kind of a car.

(*e*) *Effect of the Amendment of* 1903.—The Court of Civil Appeals refers to the amended Act of 1903 as being the most forceful and convincing provision in support of the interpretation given by the court, that a switch engine is a freight car within the meaning of the Act relating to the height of drawbars, because of the provision therein to the effect that Acts passed for the promotion of the safety of employees and travelers upon railroads shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, etc.

That the Court of Appeals has misconceived the scope of the Act of 1903 we think will appear clearly upon a study of its various provisions.

The argument of the Court of Civil Appeals is that because this statute refers specifically to locomotives, tenders, cars and similar vehicles and provides for the application of the various Safety Appliance Acts to all these kinds of cars, that

therefore a switch engine is brought within the meaning of the words "freight cars," mentioned in the fifth section of the original Act.

What this Act of 1903 means is this: All of the locomotives used on all railroads engaged in interstate commerce in the Territories and the District of Columbia, as well as in the United States, should be equipped with the appliances provided by the original Act for locomotives; and so with the other classes of cars. All cars of every interstate carrier in the United States, the Territories and the District of Columbia are to be equipped with the appliances required by the Act for such cars. All freight cars of the interstate roads in the United States, in the District of Columbia and in the Territories shall have a standard height of drawbars. Any other interpretation of this Act would require freight cars to be equipped with the appliances required for locomotives.

To illustrate: Section one of the Act of 1893 makes it unlawful for any interstate carrier by railroad to use any locomotive in moving interstate traffic, not equipped with the power driving-wheel brake and appliances for operating the train-brake system. The construction of the Court of Appeals of the Act of 1903 would require common carriers to equip each and every car whether freight car, passenger car or any other kind of car with the appliances with which a locomotive is required to be equipped. Section two of the Act of 1893 makes it unlawful for any car to be used

in moving interstate traffic, not equipped with couplers coupling automatically by impact, etc. This section being applicable to all sorts of cars as respects automatic couplers, the Act of 1903 makes it applicable not only to all kinds of cars but to all cars of all kinds, whether used in moving interstate traffic or otherwise, or whether engaged in the Territories, or in the District of Columbia, or elsewhere. In other words, where the original Act made it unlawful to use a locomotive without certain appliances while engaged in interstate traffic, the Act of 1903 applied it to all locomotives on all railroads; and likewise the Act of 1893 which made it unlawful to use a car not up to the standard height of drawbars, was made applicable to all freight cars on all railroads. It is to be noted that before the passage of the Act of 1903 it was only lawful to use a locomotive not equipped with a power driving-wheel brake when engaged in interstate commerce; it was only unlawful to use a car not equipped with automatic couplers when that car was used in moving interstate traffic. The Act upon its face was not operative in the District of Columbia, nor in the Territories. By the amendment of 1903 these various requirements of the Act of 1893 were made applicable to common carriers in the Territories, and in the District of Columbia, as well as in the United States. They were made applicable to locomotives and cars whether they were being used at the time in moving interstate traffic or not. Furthermore, at the time of the

passage of this Act of 1903 the case of Johnson *vs.* Railroad Company had been decided by the Circuit Court of Appeals and not in the Supreme Court of the United States. The Circuit Court of Appeals had held that the Act did not apply in that case because the couplers were of different make and kind. The Congress evidently undertook by the Act of 1903 to cure that defect. It was said by the Supreme Court in the Johnson case, referring to the Act of 1903:

> "As we have no doubt of the meaning of the prior law, a subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter Act is affirmative and declaratory and in effect only construed and applied the former Act. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

The mere fact that this Act makes applicable the provisions of the former Act to all trains, locomotives, tenders, cars and similar vehicles does not mean that each vehicle is to be equipped with all the appliances required for every other vehicle. It is perfectly clear that the intention of Congress was to require every locomotive on all railroads everywhere, without reference to the class of service, to be equipped with appliances prescribed by the Act for locomotives, and so with the other classes of cars. All cars of a particular class were brought by the Act within the provisions

and requirements prescribed by the Act for the particular kind of a car involved. We might as well say that this Act requires freight cars to be equipped with appliances for operating the train-brake system as to say it requires locomotives to be equipped with drawbars of a standard height.

This view, we think, is emphasized by the case of *Pennell vs. Philadelphia & Reading R. R. Co., supra.* It was contended in that case that by the amendment of 1903, the necessity of an automatic coupler between the engine and the tender was determined by reason of the fact that the amendment provided that the provisions of the original Act should apply in all cases and to all trains, locomotives, cars, etc., but this contention was denied by the court, and in effect it was held that the amendment of 1903 did not require appliances to be placed on cars which had not been required by the previous Acts.

(*f*) Under the various Safety Acts the Commission was authorized to make regulations with respect to the various conditions required by the statutes, and in addition to prosecute violations of them which might come to their knowledge.

It is significant that, under the regulations passed by the Interstate Commission with respect to switch engines and their tenders, no reference is made anywhere to any maximum height of drawbars, but, on the contrary, the Commission has invariably specified freight cars in its regulations

with respect to the maximum height of drawbars. The Commision has gone into detail as to setting out with great particularity what particular appliances shall be placed on particular equipment, and the regulations themselves, specifying the appliances, nowhere make any reference whatever to the standard height of drawbars on switch engines or the tender.

V.

Defendant in Error Assumed the Risk.

(1) *Common-law Rule.*—If the Safety Appliance Acts have no reference to this case, as stated above, then it cannot be denied that, under the facts, the defendant in error Crockett assumed the risk incident to his injury and was not entitled to a recovery. Indeed, there was no contention, when the case was heard in the Courts of Tennessee, upon the proposition that Crockett actually knew, before he entered upon his duties on the day of his injury, that the various defects existed which he now claims brought about his injury. In his own testimony, to which we have referred and which appears in detail in the record, he admitted that the alleged defective track and drawbar had existed for several days prior to his injury; that he had been at work with the identical engine, over the identical track, frequently during the days preceding the accident, and during this

time he had seen the engine become uncoupled on account of the improper height of the drawbar. He testified that this occurred twice on October 14, 1910, the very day prior to the date of his injury.

Can it then be doubted that, under this state of facts, the defendant in error assumed the risk of injury by reason of these defects? There was no contention in the courts of Tennessee upon the proposition that, under the common law, this state of facts would prevent a recovery because Crockett necessarily thereby assumed the risk of injury from these defects which he knew of and the dangers which he appreciated.

A brief reference will be made to some decisions of this court which seem to be controlling in this case.

In Gila Valley, G. & N. R. Co. *vs.* Hall, decided by this court January 5, 1914, Mr. Justice Pitney, in delivering the opinion, well states the doctrine as follows:

> "An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observed

that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. Union P. R. Co. *vs.* O'Brien, 161 U. S., 451, 457; 40 L. Ed., 766, 770; 16 Sup. Ct. Rep., 618. Texas & P. R. Co. *vs.* Archibald, 170 U. S., 665, 671; 42 L. Ed., 1188, 1191; 18 Sup. Ct. Rep., 777; Choctaw, O. & G. R. Co. *vs.* McDade, 191 U. S., 64, 68; 48 L. Ed., 96, 100; 24 Sup. Ct. Rep. 24. Texas & P. R. Co. *vs.* Swearingen, 196 U. S., 51, 62; 49 L. Ed., 382, 387; 25 Sup. Ct. Rep., 164; 17 Am. Neg. Rep., 422. Burns *vs.* Delaware & A. Teleg. & Teleph. Co., 70 N. J. L., 745, 752; 67 L. R. A., 956; 59 Atl., 220, 592; 17 Am. Neg. Rep., 673."

It was also said by Mr. Justice Day in the case of Schlemmer *vs.* Buffalo, R. & P. R. Co., 220 U. S., 590:

"In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observed that the employee may be presumed to know of them, and if he continues in the master's employ without

> objection, he takes upon himself the risk of injury from such defects. Choctaw, O. & G. R. Co. *vs.* McDade, 191 U. S., 64, 67, 68; 48 L. Ed., 96, 100, 101; 24 Sup. Ct. Rep., 24, and former cases in this court therein cited."

See also Thornton on Federal Employers' Liability Act, section 85, citing numerous cases.

It is unnecessary to cite further cases to establish the well-known salutary doctrine to which the plaintiff in error was entitled under the facts of this case.

It is urged that the action of the trial court in holding that the doctrine of assumption of risk was inapplicable is plainly erroneous and constitutes such error as entitles the plaintiff in error to a reversal.

(2) *Was the Doctrine Abolished by the Federal Employers' Liability Act?*—It was contended, though not seriously, in the lower courts that the Employers' Liability Act changed the common-law rule of the assumption of risk in a case of this kind. From a careful reading of the Act, and of the various decisions construing it, it clearly appears that such contention is erroneous.

Referring to the Act under which this suit was brought, section 4 reads as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover dam-

> ages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

By the terms of the Act itself assumption of risk is declared not to be a defense when the negligence complained of is a violation of some statute enacted for the safety of employees. The construction put upon this Act by the Court below was that the defense had been entirely abolished. Such a construction reads out of the Act entirely section 4, for if the doctrine had been abolished absolutely and in all cases why should section 4 be inserted saying that it should be deemed to be abolished in a certain particular case, to wit, when there had been violation of some statute enacted for the safety of employees, etc.? The fair and reasonable construction of the Act is to construe it as meaning what it says, namely, that the assumption of risk is abolished only where the negligence is in violation of some statute enacted for the safety of employees. We respectfully submit that the Act of Congress above referred to is the exclusive substantive law governing cases of this character; that Congress, having spoken within its constitutional powers on this subject, all State laws, so far as they are matters of substance and right, yield to the law as declared by Congress; that one of the main ob-

jects of the law was to produce uniformity in these cases throughout all of the United States and its Territories and the District of Columbia. Any other construction would only add to the already great confusion which existed prior to the passage of the Act. We would still have as many different State laws governing these cases as there are States.

This question was expressly raised in the Supreme Court of the State of Idaho in the case of Neil *vs.* Idaho, 125 Pac., 331, 341, where it was said, referring to the Federal Employers' Liability Act:

> "The provisions of section 4 of said Act of Congress do not remove the defense of assumption of risk unless the injury or death of the employee was contributed to by the violation on the part of the common carrier of any statute enacted for the safety of the employees."

Perhaps the best considered case upon the subject is that of Central Vermont Ry. Co. *vs.* Bethune, 206 Fed., 868.

This is a case of fatal injury to an employee engaged in interstate commerce. As he was passing between two standing freight trains in the discharge of his duties he was fatally injured by being crushed when one of them was put in motion, the evidence showing that the tracks were too close together. It also appeared that the deceased knew of the proximity of the tracks to each other. The

question of assumption of risk as known at common law, including the subordinate question whether that defense was available under the statutes of the United States, on which the suit was based, was considered by the court. Circuit Judge Putnam, in discussing the question whether, under the United States Statutes, the doctrine of assumption of risk applied, said:

> "We are of the opinion that it does apply, and that the instruction in question should have been given, if not in the precise form requested, yet in substance.
>
> "The statutes as amended are conveniently found in the Employers' Liability Cases, 223 U. S., 6, 7, and 8; 32 Sup. Ct., 169; 56 L. Ed., 327. The only thing therein expressly relating to this topic is section 4, appearing on page 8 of 223 U. S., 32 Sup. Ct., 169; 56 L. Ed., 327, to the effect that no employee shall be held to have assumed the risk in case of violation of 'any statute.' This section by its letter is clearly limited to a violation of a statute. In the case at bar there was no violation of any statute. There is merely a liability for the recovery of damages under certain circumstances; that is, by reason of certain defects or insufficiencies existing at common law. It is hardly to be presumed that Congress would enact statutory directions about the construction of railroads in New England in the particular involved here, where a compliance with such a statute would be perhaps ruinous. In order that the provision might apply here, instead of using the words 'violation of any statute,' it should have been

broadened out to cover all the obligations of a carrier required either by the common law or by statute; and the construction now claimed by the plaintiff for this provision is too extreme and unnatural to be accepted. * * *

"In two late decisions of the Supreme Court, it is very evident that the court proceeded on the theory that the doctrine of assumption of risk had not been shaken by the statutes, except under the limitations which we claim. Gulf Railway *vs.* McGinnis, 228 U. S., 173; 33 Sup. Ct., 426; 57 L. Ed., —, contains the following:

> "'It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition a number of special requests asked by the railroad company in respect of several aspects of the facts were given. The contention is that upon all the evidence in the case there was no sufficient evidence of any negligence for which the company was chargeable in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by.'

"We have examined the Supreme Court record in that case, and we find that this assigned error was passed by because the local court in various forms had instructed

the jury on the question of assumption of risk favorably to the defendant in the language of the common law. Of like impression is Seaboard Air Line Railway *vs.* Moore, 228 U. S., 433, 434, 435; 33 Sup. Ct., 580; 57 L. Ed., —. What is found in Employers' Liability Cases, 223 U. S., 1, 49, 50; 32 Sup Ct., 169, 175 (56 L. Ed., 327), is even more efficient, as follows:

> " 'The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury.'

"It is true this does not assume an affirmative, direct form in favor of our proposition, but it hardly could be used unless as much as that was meant. At any rate, this extract and the other references in opinions of the Supreme Court suggesting the assumption of risk as applicable under the statutes in question would not have appeared unless the court intended to maintain the existence or the continuance of the doctrine, because otherwise all these allusions to it would have been cut out by a short method. * * *

"The other questions, which may never come up again, we pass by. For the present we leave the case to stand on the fact that

the district court held that the statutes applicable practically set aside the common-law doctrine of the assumption of risk, so far as the questions involved here are concerned, as to which specific directions should have been given with reference to all the relations of that doctrine to any state of facts which the jury might have been permitted to find."

In the case of Michigan Central R. R. Co. *vs.* Vreeland, decided January 20, 1913, in speaking of this very Act, it was said by this court, speaking through Mr. Justice Lurton, as follows:

"We may not piece out this Act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The Act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States.

"Prior to this Act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in Second Employers' Liability Cases (Mondou *vs.* New York, N. H. & H. R. Co.), 223 U. S., 1; 54, 56 L. Ed., 327, 347; 38 L. R. A. (N. S.), 44; 32 Sup. Ct. Rep., 169, 'is one which falls within the police power of the State in the absence of regulation by Congress.' By this Act Congress has undertaken to cover the subject of the liability of railroad companies

> to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the State."

Again, in the same case, it is said:

> "The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding State legislation."

Again, in the case of Seaboard Air Line *vs.* Moore, 228 U. S., 433, opinion by Chief Justice White, it is said:

> "Based upon a statement made in the opinion of the court below to the effect that the case of Mondou *vs.* New York, 223 U. S., 1, was decisive of the constitutionality and applicability to the case of the Employers' Liability Law, and, moreover, disposed of a number of contentions urged in the assignments of error filed below, it is pressed upon our attention that the court decided and erred in deciding that the Employers' Liability Law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and, also, that a railroad employee injured in the course of his employment could avail of the benefits of the stat-

> ute although at the time he sustained the injury he was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit. * * * It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because in any event the contentions must be overruled, since the benefit of the defense of assumption of risk was accorded to the railway company at the trial and the right of the plaintiff to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce."

It is perfectly clear from the opinion in this case that the doctrine of assumption of risk was regarded as obtaining and put before the jury by the lower court, and this court says that this was right. In the case at bar the court below distinctly declined to permit this defense to be put forward by the railroad company.

Again this court, in the case of Gulf, &c., Co. *vs.* McGinnis, 228 U. S., 173, in discussing the Act now under discussion, says:

> "It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge."

From an examination of the original record in this court, the full and fair general charge above referred to was, in part, as follows:

> "An employee of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees that are chargeable to it are not assumed by an employee, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service."

Again, in the case of American R. Co. *vs.* Birch, 224 U. S., 544; 56 L. Ed., 879, in discussing this Act, this court says, through Mr. Justice McKenna, as follows:

> "Section 3 includes (excludes?) the defense of contributory negligence, but requires the damages to be 'diminished by the jury in proportion to the amount of negligence attributable to such employee.' But provides that contributory negligence is not to be attributable to the employee injured or killed 'where the violation by such common carrier of a statute enacted for the safety of employees contributed to the injury or death of such employee is also excluded in such case."

There would be no sense in the court saying that assumption of risk is excluded in such case if it was excluded in all cases.

In the case of Mondou *vs.* New York, &c., Co., 223 U. S., in discussing the Act now under consideration, this court said at page 54 (56 L. Ed., 348):

> "True, prior to the present Act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress." (Citation of cases.) "The inaction of Congress, however, in nowise affected its power over the subject." (Citation of cases.) "And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

The Supreme Court of Georgia has distinctly held that the defense of assumption of risk was not abolished by the Act of Congress except in cases where the servant was injured through the violation by the master of some statute enacted for the safety of employees. See Bowers *vs.* Southern Ry. Co., 73 S. E., 679.

Reference is also made to the following cases in State and Federal courts, in which it is plainly recognized that in cases arising under the Federal Employers' Liability Act the doctrine of assumption of risk is still open as a defense.

See

Baker *vs.* Kansas City, &c. (Kan.), 129 Pac., 1151.

Freeman *vs.* Powell (Tex.), 144 S. W., 1033.

Union Pacific R. Co. *vs.* Fuller, 204 Fed., 45.

Southern Railway Company *vs.* Gadd, 207 Fed., 277.

Worthington *vs.* Elmer, 207 Fed., 306.

Louisville & Nashville R. Co. *vs.* Lankford, 209 Fed., 321.

See also

Cleveland, &c., Railway *vs.* Bossert, 87 N. E., 158.

We respectfully submit, for the foregoing reasons, the judgment of the Supreme Court of Tennessee should be reversed and the suit dismissed.

Respectfully submitted,

L. E. JEFFRIES,
L. D. SMITH,
Attorneys for Plaintiff in Error.

MARCH 12, 1914.

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No. 826

In the Supreme Court of the United States

OCTOBER TERM, 1913.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. E. CROCKETT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

MOTION TO DISMISS, AFFIRM OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

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IN ERROR TO THE SUPREME COURT OF TENNESSEE.

MOTION TO DISMISS, AFFIRM OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Comes the defendant in error and moves the Court:

1. That the writ of error be dismissed because no question is presented authorizing this Court to take jurisdiction of the case;

2. In the alternative, that the judgment of the Supreme Court of Tennessee be affirmed, because the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument; and

3. In case neither of said motions be sustained, that the case be transferred for hearing to the summary docket, because the question involved is of such character as not to justify extended argument.

STATEMENT OF THE CASE.

The facts sufficiently appear in the petition for a writ of error which is printed as an appendix hereto.

Crockett's claim as to the facts here material is, that he was in the employ of the Company as switchman; that on October 15th, 1910, while engaged in making up a freight train in which there was interstate commerce, the freight car on which he was riding became detached from the engine because the engine was not equipped with a draw bar having the height from the tops of the rails required by the Safety Appliance Acts; and that the car, having become so detached, ran down a grade against some other cars, thereby causing the injury complained of.

On the trial it was not questioned that the engine crew was engaged in handling interstate commerce in making up the train; but it was insisted that the Safety Appliance Acts requiring "freight cars" to be equipped with couplers of a specified height above the rails does not apply to *engines,* and hence, that Section 4 of the Employers' Liability Act of April 22nd, 1908, (Ch. 149, 35 Stat. 66), which provides:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;"

and Section 8 of the Safety Appliance Act of *March 2nd*, 1893, (Ch. 196, 27 Stat. 532), which provides that:

> "Any employee of any such carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge;"

have no application to the facts of this case. Upon this theory the attorney for the Company requested the Trial Court: first, for peremptory instructions, in favor of the Company, on the ground that if the coupler was defective Crockett had assumed the risk as a matter of law; and second, if the Court felt that peremptory instructions should not be given, that he submit to the jury a proposition defining the law relating to the assumption of risk. The Court took the view that the provisions of the Safety Appliance Acts relating to draw bars apply to freight engines as well as freight cars, and hence refused both propositions. A verdict was returned against the Company for $1,000.00, and a judgment was rendered for that sum. An appeal was prosecuted to the Court of Civil Appeals, and the judgment was there affirmed, that Court, in an extended written opinion, expressing the same view of the law as that taken by the Court below. A petition for a writ of *certiorari* to bring the case for review before the Supreme Court was presented to that Court and was by it disallowed without expressing any formal opinion, and final judgment was pronounced against the Com-

pany for the amount of the judgment below and interest. It is this judgment which is here sought to be reviewed.

ARGUMENT.

I.

The writ of error should be dismissed because no question is presented which authorizes this Court to take jurisdiction of the case.

Plaintiff in error seeks to have this Court take jurisdiction under those clauses of Section 237 of the Judicial Code of the United States, which provide:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had x x x where any title, right, privilege or immunity is claimed under x x x any x x x statute of x x x the United States, and the decision is against the title, right, privilege or immunity, especially set up or claimed by either party, under such x x x statute, x x x may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Plaintiff in error's contention is thus stated in its petition for a writ of error:

"The case involved the construction of Section 5 of the Acts of Congress known as the Safety Appliance Acts, approved March 2nd, 1893, as amended by the Acts of Congress, April 1st, 1896, which said Act authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars. The construction given by the Supreme Court of Tennessee of said

Statute made it applicable to a switch engine, and held the petitioner liable to the plaintiff, only because said statute required petitioner to have its switch engines equipped with a draw bar of the standard height fixed by the Interstate Commerce Commission. Said judgment could not have been rendered against the petitioner, but for the erroneous construction of said statute. Petitioner avers that said statute did not require the petitioner to have the draw bar on its switch engine of the standard height prescribed by the Interstate Commerce Commission for freight cars, and said judgment could not have been rendered against the petitioner consistently with the said statutes of the United States." (See Appendix, p. 14).

Clearly, the plaintiff in error is claiming no title, right, privilege or immunity under the statute in question, and the decision of the state courts is not against any title, right, privilege or immunity claimed under that statute. The right or immunity referred to in Section 237 is one created by the positive terms of the Act itself, and is not a right or immunity which exists independently of the statute. Here plaintiff in error's contention is that *notwithstanding the statute,* it can rely for defense upon the common law principle of the assumption of risk.

Kaiser v. Texarkana & Fort Smith Ry. Co., 179 *U. S.*, 199, is directly in point. There Kaiser sued the Company to recover damages for the breach of an alleged contract between the parties by which the Company agreed to transport for Kaiser lumber for a certain compensation. The defense was that the contract was violative of the Interstate Commerce Act. The State Courts sustained this defense, and Kaiser brought the

case to this Court on a writ of error. It was held that this Court had no jurisdiction because no right or immunity under a Federal Statute had been denied.

Montgomery v. Hernandez, 12 *Wheat.,* 129-133, illustrates the character of right or immunity referred to by the statute. That was an action on a bond taken under a United States Statute and was defended on the grounds: first, that the action was not brought in the name of the United States; and second, that the action was barred by an express provision of an Act of Congress. The Court refused to consider the first ground, as being immaterial, but did consider the second ground, because it was claimed that the immunity was created by express Act.

The decision of the State Courts was not against the Safety Appliance Act, but was in its favor, making it apply to a state of facts which it is insisted was not included in its language. By the express language of Section 237, as well as by numerous decisions of this Court, no jurisdiction will be entertained unless the decision sought to be reviewed has restricted, and not enlarged, the scope of the Act.

II.

If this Court has jurisdiction, the case should be affirmed, because the decision of the State Courts is so manifestly right that the case should not be kept upon the docket for further argument.

By Section 5 of the Safety Appliance Act of 1893, (Ch. 196, 27 Stat. 531), the American Railway Association was authorized within ninety days from the passage of the Act to designate to the Interstate Commerce Commission the standard height of draw bars

for "freight cars" measured perpendicularly from the level of the tops of the rails to the center of the draw bars, etc. By Act of March 2nd, 1903, (Ch. 976, 32 Stat. 943), it was provided that the requirements of the various Acts relating to train brakes, automatic couplers, grab irons and *height of draw bars* should be held to apply to *all trains, locomotives,* tenders, cars and *similar vehicles* used on any railroad engaged in interstate commerce, etc. And by Act of April, 1910, (Ch. 160, 36 Stat. 298), the Commission was authorized, after hearing, to modify or change the standard height of draw bars, and to fix the time within which modifications or changes should become effective, and it was provided that prior to the time fixed it should be unlawful to use "any car or *vehicle*" in interstate or foreign traffic which did not comply with the standard then fixed, and that after the time so fixed it should be unlawful to use "any car or *vehicle*" in interstate or foreign traffic which did not comply with the standard prescribed by the Commission.

In *Johnson v. Southern Pacific,* 196 *U. S.,* 1, it was held that the second section of the Safety Appliance Act of 1893 prohibiting the hauling of "any car" used in moving interstate traffic not equipped with automatic couplers, applies to a locomotive, thus holding that a locomotive is embraced in the word "car."

In *Schlemmer v. Buffalo R. & P. R. Co.,* 205 *U. S.,* 1-10, it was said that the provisions of the Act of 1903 indicated the extent of the original Act.

It is apparent that the reasoning of the Court in the Johnson case is equally applicable to the present case, and that the subsequent Act of 1910 is confirmatory of that construction. If the word "car" includes a locomotive under the second section of the Act of

1893, there is no reason in holding that the words "freight car" do not include a locomotive used in making up or handling a *freight* train. Because the Safety Appliance Acts are remedial and by express declaration were enacted for the purpose of promoting the safety of employees, this Court has always given to them a liberal construction.

III.

In any event, the question presented is of narrow compass, and does not justify an extended argument, and the case should be transferred for hearing to the summary docket.

The facts above stated, as detailed at greater length in the petition which appears as an appendix hereto, show that there is but the one question involved, and that question cannot admit of an extended argument.

J. A. FOWLER,
Attorney for Defendant in Error.

A. C. GRIMM,
H. G. FOWLER.
Of Counsel.

APPENDIX

IN THE SUPREME COURT OF TENNESSEE.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
VS.
D. E. CROCKETT,
Defendant in Error.

TO THE HONORABLE M. M. NEIL, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF TENNESSEE.

The Petition of the Southern Railway Company, a railroad corporation organized under and existing by virtue of the laws of the State of Virginia, and a resident and citizen of said state, but engaged in the business of an interstate carrier by railroad in the State of Tennessee, and other states, for writ of error to the Supreme Court of the State of Tennessee in the above entitled cause.

The petitioner respectfully shows:

1. Heretofore, and on the 2d day of March, 1911, D. E. Crockett, a resident and citizen of the State of Tennessee, commenced in the Circuit Court of Knox County, in said State, an action against the petitioner, the Southern Railway Company, to recover from it the sum of Ten Thousand Dollars ($10,000) damages.

On the 21st day of April, 1911, the said D. E. Crockett, in said action filed his declaration setting forth therein his cause of action; alleging that petitioner, the Southern Railway Company, was on the 15th of October, 1910, and had been prior to that date a railroad corporation operating various lines of

railroad through Knoxville in the State of Tennessee, through the States of Kentucky, Virginia and other states, and was on said date engaged in the handling of interstate commerce; that on the date aforesaid, and while the petitioner, Southern Railway Company, was engaged in interstate commerce by railroad and said D. E. Crockett was an employee of the said Southern Railway Company, engaged in the discharge of his duties as a switchman, when he was injured by reason of negligence of the petitioner, Southern Railway Company, in, among other things, that it had allowed the draw bar of its locomotive to be out of repair, and in a defective condition, so that it became unfastened and uncoupled from the cars to which it was attached, and thereby allowed said cars to run into other cars, and by the collision threw and hurled the plaintiff against the cars, and injuring him in the back, head, arms, etc.

In his said declaration the said plaintiff does not specifically aver that his right of action is governed by the United States Statute, commonly known as the Federal Employers' Liability Act, nor does he aver that his injuries resulted from a failure upon the part of the Railway Company to observe and comply with the provisions of the United States Statute, known as the Safety Appliance Act, but the facts set forth in the plaintiff's said declaration show that the said plaintiff was injured while he was employed, and engaged in the service of the petitioner while it was transporting interstate traffic, and thereby brought this case within the provisions of the said Employer's Liability Act.

In his declaration the plaintiff set forth many and various acts of negligence, but the only averment necessary to be noticed in this petition is that which charges that plaintiff's injuries resulted from the fact that the draw bar of the switch engine, which was moving the cars upon which plaintiff was employed, was defective. The reason why no other averment in said declaration needs to be here noticed will more fully appear hereinafter.

2. On the 2d day of May, 1911, the petitioner, Southern Railway Company, appeared in the said Circuit Court of Knox County, Tennessee, and answered the plaintiff's said suit, by

plea, denying that it was guilty of any of the wrongs and injuries complained of, as set forth by the plaintiff in his declaration.

3. On the 16th day of October, 1912, said cause came on for hearing and trial in the said Circuit Court of Knox County, Tennessee, when the same was submitted to a jury in said Court upon the evidence introduced by the plaintiff and petitioner. Under the instructions of the Court, which were erroneous, as the petitioner shall undertake hereinafter to show, the jury returned a verdict in favor of the plaintiff, and against the petitioner for One Thousand Dollars ($1,000). A motion for a new trial made in said Court on the ground hereinafter set forth, and in accordance with the rules of said Court, was by said Court overruled and judgment was pronounced against the petitioner for the said sum of One Thousand Dollars ($1,000).

4. From the judgment aforesaid pronounced by the said Circuit Court of Knox County, Tennessee, the petitioner appealed to the Court of Civil Appeals of the said State of Tennessee sitting at Knoxville in said state. In the said Court of Civil Appeals the petitioner sought a reversal of the judgment of the Circuit Court of Knox County, Tennessee, assigning therein as error the action of the said Circuit Court in two respects, to-wit:

(1). In refusing to sustain the motion made by the petitioner to peremptorily instruct the jury to return a verdict in its favor, because it was shown by the evidence without contradiction that the defective conditions of the engine and track were well and perfectly known to the plaintiff, and the dangers incident to his work therewith, were appreciated before the accident occurred, and that the plaintiff assumed the risks of injury resulting therefrom; that the particular defects not being such as are prohibited by the Safety Appliance Statutes, the Federal Employer's Liability Act did not abolish the defence of the assumption of risk applicable to the facts as stated under the common law.

(2). The Circuit Court was in error in declining to instruct the jury as requested by the petitioner, as follows:

"If the jury should find from the evidence that the draw

bar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still if you should further find that these defective conditions had existed prior to the time, with the knowledge of the plaintiff, and the plaintiff knew before he went to work that the defects existed at that time, and that by reason thereof, the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court should charge that under these facts the plaintiff could not recover, and your verdict should be in favor of the defendant."

This action of the said Circuit Court was in said Court of Civil Appeals, urged as erroneous, because the evidence conclusively showed, or at any rate tended to show, that the plaintiff knew before he went to work that the defects existed at that time, and that by reason thereof, the engine was accustomed to become uncoupled, and that he went to work with these defective conditions existing, and with full knowledge thereof, and with appreciation of the danger incident thereto; and because the defects complained of were not such as were prohibited by any statute enacted for the safety of employees. Therefore, under the Employer's Liability Statute the plaintiff could not recover, because he should be held to have assumed the risks.

The said Court of Civil Appeals disallowed and overruled all of the assignments of error filed by the petitioner in said court, and on the 28th day of August, 1913, pronounced a judgment affirming the judgment of the Circuit Court of Knox County, Tennessee, in favor of the said plaintiff, against the petitioner for the sum of One Thousand Dollars ($1,000) with interest thereon and all costs of the case.

5. Thereupon, and in accordance with the provision of the statutes of Tennessee, on the 3d day of October, 1913, the petitioner filed in the Supreme Court of Tennessee, a petition asking for writs of *certiorari* and *supersedeas* to have reviewed and reversed the judgment of the Court of Civil Appeals aforesaid, setting forth in said petition that the action of said Court of Civil Appeals was erroneous, the assignment of error being in the following words, to-wit:

"The Court of Civil Appeals was in error in holding that the Federal Safety Appliances Statute, at the time of the injury complained of, October 15, 1910, prohibited the railway company from using a switch engine with the draw bar less than thirty-one and one-half inches in height, measured perpendicularly from the level of the tops of the rails to the centers of the draw bars, and therefore in holding that the defendant in error did not assume the risks incident to the defective conditions, which he knew to exist. As there was no dispute in the evidence that he did know of these defects and fully appreciated the danger incident to service in connection therewith, the suit of the defendant in error should have been dismissed, plaintiff in error having in the court below made a motion for peremptory instructions based upon this ground.

"The Safety Appliance Acts authorized the Interstate Commerce Commission to designate the standard height of drawbars for 'freight cars;' it did not itself fix any standard, nor authorize the Interstate Commerce Commission to fix any standard for the height of drawbars on switch engines."

The Supreme Court of Tennessee, on the 22d day of October, 1913, being then in session at Knoxville, Tennessee, upon the petition of the Southern Railway Company, made and passed a final judgment and decree in this case, by which it affirmed the judgment of the Circuit Court of Knox County, Tennessee, and the judgment of the Court of Civil Appeals of said state, overruling and disallowing the petition, and assignments of error, and pronounced judgment against the petitioner and in favor of the said D. E. Crockett, in the sum of One Thousand and Sixty Dollars and Seventy-seven cents ($1060.77), together with all the costs of the cause.

The said D. E. Crockett has demanded of the Clerk of the Supreme Court of Tennessee the issuance of, and the Clerk will issue an execution against the petitioner, and the petitioner will be compelled thereby to pay said judgment, unless the collection thereof is restrained and stayed by writs of error and *supersedeas*, notwithstanding said judgment is erroneous. The said judgment aforesaid of the Supreme Court of Tennessee is a final judgment in the highest court of the State, in which a decision of said suit could or can be had.

6. The petitioner further shows that there was involved and made in said case a federal question, which was a final determination of the issues involved therein, and said final determination was repugnant to and in conflict with the laws of the United States, and the Acts of Congress known as the Employer's Liability Act, and the Safety Appliance Act, and the said judgment was contrary thereto, and the decision of said question was necessary to the judgment rendered.

The case involved the construction of Section 5, of the Acts of Congress, known as the Safety Appliance Acts approved March 2, 1893, as amended by the Acts of Congress, April 1, 1896, which said Act authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars. The construction given by the Supreme Court of Tennessee of said statute made it applicable to a switch engine, and held the petitioner liable to the plaintiff, only because said statute required petitioner to have its switch engines equipped with a draw bar of the standard height fixed by the Interstate Commerce Commission. Said judgment could not have been rendered against the petitioner, but for such erroneous construction of said statute. Petitioner avers that said statute did not require the petitioner to have the draw bar on its switch engine of the standard height prescribed by the Interstate Commerce Commission for freight cars, and said judgment could not have been rendered against the petitioner consistently with the said Statutes of the United States.

The case further involved the construction of the Act of Congress, approved April 22, 1908, known as the Employer's Liability Act, and particularly sections 1 and 4 of said Act. The Supreme Court of Tennessee, so construed said Statutes, as to hold that notwithstanding the plaintiff knew of the existence of the defects before, and at the time he went to work therewith, and fully appreciated the danger incident thereto, he did not by reason of said Statute assume the risk, and was therefore entitled to recover. Said judgment could not have been rendered against the petitioner, but for such erroneous construction of said statute.

Petitioner was therefore, by the final judgment aforesaid denied rights, privileges and immunities to which it was entitled under the statutes of the United States. The decision aforesaid was against the said rights, privileges and immunities. The error committed by the Supreme Court of Tennessee in the interpretation of said statute, and in pronouncing said judgment, will be more particularly pointed out in the assignments of error hereto attached, all of which was duly raised by assignments of error in the said Supreme Court of Tennessee, in the Court of Civil Appeals of Tennessee, and raised and presented in the Circuit Court of Knox County, Tennessee.

Wherefore your petitioner presents herewith an exemplified transcript of the record in said case, and prays that a writ of error to the Supreme Court of Tennessee be allowed to bring before the Supreme Court of the United States, for review and reversal, the said judgment and decree of the Supreme Court of Tennessee; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a *supersedeas* and that the errors complained of may be reviewed and reversed by the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY,

By.....

Attorney.

SOUTHERN RAILWAY COMPANY *v.* CROCKETT.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 826. Submitted April 16, 1914.—Decided June 22, 1914.

Motion to dismiss a writ of error to the state court to review a judgment in an action under the Employers' Liability Act in which the construction of the Safety Appliance Acts was involved, denied.

By the Employers' Liability Act the defense of assumption of risk remains as at common law, save in those cases mentioned in § 4 where the violation by the carrier of any statute enacted for the safety of employés contributed to the accident.

This court has heretofore construed the letter of the Safety Appliance Act in the light of its spirit and purpose as indicated by the title no less than by the enacting clauses and that guiding principle should be adhered to.

Although the original Safety Appliance Act may not have applied to vehicles other than freight cars, the amendment of 1903 so broadened its scope as to make its provisions, including those respecting

height of draw-bars, applicable to locomotives other than those that are excepted in terms.

By the amendment of 1903 to the Safety Appliance Act the standard height of draw-bars was made applicable to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles, including locomotives, used in connection with them so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. *Chicago &c. Ry. Co.* v. *United States*, 196 Fed. Rep. 882, approved.

THE facts, which involve the construction and application of the provisions of the Safety Appliance Acts and of the Employers' Liability Act, are stated in the opinion.

Mr. L. E. Jeffries and *Mr. L. D. Smith* for plaintiff in error:

The Safety Appliance Act did not require a draw-bar thirty-one and one-half inches high. A switch-engine is not a freight car. The words "all cars" in § 2 are not applicable to height of draw-bars. The effect of the act of 1893, and the effect of the amendment of 1903 were misconceived by the Circuit Court of Appeals.

The defendant in error assumed the risk: such was the common-law rule and that doctrine was not abolished by the Federal Employers' Liability Act.

In support of these contentions, see *American R. R. Co.* v. *Birch*, 224 U. S. 544; *Baker* v. *Kansas City &c.*, 129 Pac. Rep. 1151; *Bowers* v. *Southern Ry. Co.*, 73 S. E. Rep. 679; *Burns* v. *Delaware Tel. Co.*, 7 N. J. L. 745; *California Bank* v. *Kennedy*, 167 U. S. 362; *Central Vt. Ry. Co.* v. *Bethune*, 206 Fed. Rep. 868; *Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64; *Cleveland &c. Ry.* v. *Bassert*, 87 N. E. Rep. 158; *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Eau Claire Bank* v. *Jackman*, 204 U. S. 522; *Employers' Liability Cases*, 223 U. S. 6; *Freeman* v. *Powell*, 114 S. W. Rep. 1033; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94; *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Hammond* v. *Whitt-*

redge, 204 U. S. 538; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514; *Johnson* v. *Railroad Co.*, 196 U. S. 1; *Kan. City Sou. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Kizer* v. *Texarkana Ry. Co.*, 179 U. S. 199; *Louis. & Nash. R. R. Co.* v. *Lankford*, 209 Fed. Rep. 321; *McCormick* v. *Market Bank*, 165 U. S. 538; *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1; *Neil* v. *Idaho*, 125 Pac. Rep. 331; *Neilson* v. *Lagow*, 12 How. 98; *Nutt* v. *Knut*, 200 U. S. 12; *Pennell* v. *Phila. & R. Ry. Co.*, 231 U. S. 675; *Rector* v. *City Deposit Bank Co.*, 200 U. S. 405; *St. L., I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *St. L., I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 275; *St. L., S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 220 U. S. 590; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477; *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Southern Ry. Co.* v. *Gadd*, 207 Fed. Rep. 277; *Swafford* v. *Templeton*, 185 U. S. 487; *Tex. & Pac. Ry. Co.* v. *Archibald*, 170 U. S. 665; *Tex. & Pac. Ry. Co.* v. *Swearingen*, 196 U. S. 51; *Un. Pac. R. R. Co.* v. *O'Brien*, 161 U. S. 451; *Un. Pac. R. R. Co.* v. *Fuller*, 202 Fed. Rep. 45; *Worthington* v. *Elmer*, 207 Fed. Rep. 306.

Mr. J. A. Fowler, *Mr. A. C. Grimm* and *Mr. H. G. Fowler* for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

Crockett, the defendant in error, brought this action in the Circuit Court of Knox County, Tennessee, to recover damages for personal injuries sustained by him while in the employ of the Railway Company. The action was based upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, in connection with the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat.

531, and the amendments of 1896 and 1903, c. 87, 29 Stat. 85; c. 976, 32 Stat. 943. He recovered a judgment in the trial court, which was affirmed by the Court of Civil Appeals. A petition for a writ of certiorari being presented to the Supreme Court of Tennessee, that court dismissed the petition and affirmed the judgment.

The facts, so far as material, are as follows: Defendant was an interstate carrier by railroad, and plaintiff was in its employ as a switchman and was engaged in a movement of interstate commerce at the time he was injured. The date of the occurrence was October 15, 1910. In making up a freight train, a switch-engine, with a freight car attached, was being moved down grade towards where other freight cars were standing upon the track, when the single car became uncoupled from the engine, and, being propelled by gravity towards the standing cars, came into contact with them. Plaintiff, being upon the car which thus became uncoupled, was by the impact thrown against the brake and injured. He insisted that the car became detached from the engine because of the defective condition of the track at that point, in conjunction with the insufficient height of the draw-bar on the engine. There was evidence tending to show that the ground upon which the track rested was wet and marshy, and the cross-ties broken and insufficient, so that the track was uneven and rough, and that, as a result, the engine and the car attached to it were made to alternately rise and fall at the ends where they were coupled together; and tending further to show that the draw-bar upon the engine, which was used in coupling the car to it, was not more than thirty inches high, measured from the track to the center of the draw-bar; that it was too low to engage properly with the couplers of ordinary freight cars, and that because of the resulting inadequacy of the coupling, together with the unevenness of the track, the car in question became detached. There was, however, evidence

tending to show that plaintiff knew of the defective condition of the track and of the engine; that he had passed over the same track frequently with the same engine, and that prior to the occurrence in question cars had, as he knew, repeatedly become detached from the engine because of the conditions mentioned. It was either found or assumed by the state courts that defendant's railway was of standard gauge, and that the standard height of draw-bars for freight cars ranged between a maximum of 34½ inches and a minimum of 31½ inches. See Resolution of Interstate Commerce Commission, June 6, 1893 (Ann. Rep. I. C. C., 1893, pp. 74, 263), construed in *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 286; see also, Ann. Rep. I. C. C., 1896, p. 94. It should be noted that the alleged cause of action arose October 15, 1910, after the enactment of the amendment of that year to the Safety Appliance Act, but before the taking effect of the Commission's order respecting draw-bars, made pursuant to the new law. This order while dated October 10, 1910, became effective on December 31 following.

Defendant requested the trial court to direct a verdict in its favor, upon the ground that plaintiff admittedly knew of the defects and therefore assumed the risk. The court refused the motion, and likewise refused the request of defendant for an instruction to the jury in the following terms: "If the jury should find from the evidence that the draw-bar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still, if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges you that under those facts the plaintiff

could not recover, and your verdict should be in favor of the defendant."

The contentions of defendant, overruled by each of the state courts and here renewed, are, that by the true interpretation of the Employers' Liability Act the common-law rule respecting the assumption of risk was not abolished except in cases where the violation by the carrier of some statute enacted for the safety of employés contributed to the injury of the employé; and that by the Safety Appliance Act and amendments, as properly interpreted, the height or construction of the draw-bars of locomotives was not regulated, so that the fact that the draw-bar in question was only thirty inches high was not a violation of these acts, and hence afforded no ground for a recovery under the Employers' Liability Act.

There is a motion to dismiss, based upon the insistence that the record presents no question reviewable in this court under § 237, Jud. Code (act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). The motion must be overruled, upon the authority of *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 293; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, 486; *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 499.

Upon the merits, we of course sustain the contention that by the Employers' Liability Act the defence of assumption of risk remains as at common law, saving in the cases mentioned in § 4, that is to say: "any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502.

This leaves for determination the question whether the provision of § 5 of the Safety Appliance Act of 1893 respecting the standard height of draw-bars, together with the order of the Interstate Commerce Commission promul-

gated in pursuance of it, and the 1903 amendment of that act, had the effect of regulating the height of draw-bars upon locomotive engines, as contended by plaintiff, or upon freight cars only, as contended by defendant.[1]

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[1] SAFETY APPLIANCE Act of March 2, 1893, c. 196, 27 Stat. 531.

"An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted, etc., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

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SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety four, and immediately to give

In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, a case that arose under the act as it stood before the 1903 amendment, it was held that the provision of § 2 rendering it "unlawful for any such common carrier to haul or permit

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notice thereof as aforesaid. After July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided*, that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

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SEC. 8. That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

AMENDMENT OF APRIL 1, 1896, c. 87, 29 Stat. 85.

"*Be it enacted*, etc., That section six of an Act entitled . . . be amended so as to read as follows:

'SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided*, that nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'"

AMENDMENT OF MARCH 2, 1903, c. 976, 32 Stat. 943.

"*Be it enacted*, etc., That the provisions and requirements of the Act entitled 'An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three,

to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," was broad enough to embrace locomotive engines within the description "any car." This conclusion was based upon the declared purpose of Congress to promote the safety of employés and travelers upon railroads engaged in interstate commerce, and the specific intent to require the installation of such an equipment that the cars would couple with each other automatically by impact and obviate the necessity of men going between them either for coupling or for uncoupling. The court, by Mr.

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and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

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AMENDMENT OF APRIL 14, 1910, c. 160, 36 Stat. 298.

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"SEC. 3. . . . Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission."

Chief Justice Fuller, pointed out (pp. 20, 21) that by the amendment of March 2, 1903, the provisions and requirements of the act were extended to common carriers by railroad in the Territories and the District of Columbia, and were made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type," and that the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw-bars, were made to apply to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." And it was said that this amendment was affirmative and declaratory of the meaning attributed by the court to the prior law.

In *Schlemmer* v. *Buffalo, Rochester &c. Railway*, 205 U. S. 1, 10, it was held that a shovel car was within the contemplation of § 2.

In *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26, it was held that the 1903 amendment had enlarged the scope of the original act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles were at the time employed in interstate commerce or not.

In *Pennell* v. *Phila. & Reading Ry.*, 231 U. S. 675, the question was whether the provision respecting automatic couplers was applicable to the coupling between the locomotive and the tender. This was answered in the negative, the court saying (p. 678): "Engine and tender are a single thing; separable, it may be, but never separated in their ordinary and essential use. The connection between them, that is, between the engine and tender, it was testified, was in the nature of a permanent coupling, and it was also testified that there was practically no opening between the engine and tender, and that attached to the engine was a draw-bar which fitted in the

yoke of the tender, and the pin was dropped down to connect draw-bar and yoke. The necessary deduction from this is that no dangerous position was assumed by an employé in coupling the engine and tender for the reason that the pin was dropped through the bar from the tank of the tender."

In each of these cases, the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented. Conceding that it may be doubtful whether the act, in its original form, evidenced an intent on the part of Congress to standardize the height of draw-bars upon vehicles other than freight cars, and therefore assuming for argument's sake that the act was not in this respect applicable to locomotive engines, it seems to us that the amendment of 1903, manifestly enacted for the purpose of broadening the scope of the original act, must upon a fair construction be deemed to extend its provisions and requirements respecting the standard height of draw-bars, so as to make them applicable to locomotives, excepting such as are in terms exempted.

There was abundant reason for applying the standard to locomotives. The draw-bar—sometimes called the "draw-head"—carries at its outer end the device or mechanism for coupling the cars. The height of the draw-bar determines the height of the coupler, and has an intimate relation not only to the safety of the coupling operation but to the security of the coupling when made. See Car-Builders Dict. (1884), *tit.* "Draw-bar" and "Draw-head," and Figs. 395–643; Voss, Railway Construction (1892), pp. 16, 91, etc. The evidence in this case shows, without contradiction, that the gripping surface of the coupling knuckle on the freight car in question, measured vertically, was between seven and nine inches, and that

because of the comparatively low level of the engine's draw-bar the effective grip was reduced to the point of practical inefficiency. Indeed, it is not seriously disputed that there exists as much reason for having the draw-bars of the locomotive adjusted to a standard of height as exists in the case of freight cars.

The experience of the Interstate Commerce Commission, in seeing to the enforcement of the act of 1893, tended to emphasize the importance of interchangeable equipment upon the rolling stock of railroads engaged in interstate commerce, so that cars used in such commerce would readily couple with cars not so used, and that locomotives could be readily coupled with cars of either sort. The 16th Annual Report of the Commission, 1902, pp. 60, 61, recommended to Congress, *inter alia:* "That provisions relating to automatic couplers, grab irons, and the height of draw-bars, be made to apply to all locomotives, tenders, cars, and similar vehicles, both those equipped in interstate commerce and those used in connection therewith (except those trains, cars, and locomotives exempted by the acts of March 2, 1893, and April 1, 1896)." This recommendation appears to have been evoked by the decision of the Circuit Court of Appeals in *Johnson* v. *Southern Pacific Co.*, 117 Fed. Rep. 462, afterwards reversed by this court in 196 U. S. 1. The Court of Appeals held that there was nothing in the act of 1893 to require a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or to require that every car should be equipped with a coupler that would couple automatically with every other coupler with which it might be brought into contact; and also that the act did not forbid the use of an engine not equipped with automatic couplers. Congress not only responded to the recommendation of the Commission, but enlarged the act more broadly by enacting (Amendment of March 2, 1903, set forth in foot-note,

supra) that the provisions and requirements of the original act should be held (a) to apply to common carriers by railroad in the Territories and the District of Columbia; (b) to apply in all cases whether or not the couplers brought together are of the same kind, make, or type; (c) that "the provisions and requirements . . . relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," excepting those exempted by the act of March 2, 1893, as amended April 1, 1896, and those used upon street railways. We have to do especially with the latter clause. As was intimated in *Southern Railway Co.* v. *United States*, 222 U. S. 20, 25, its collocation of phrases is not altogether artistic. But at least the purpose is plain that where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard. We cannot assent to the argument that the clause means only that the locomotives used upon all railroads engaged in interstate commerce and in the Territories and the District of Columbia are to be equipped with the appliances provided by the original act for locomotives, and so on with the other classes of cars, and that hence the amendatory act has merely the effect of prescribing the standard height of draw-bars with respect to freight cars, because the original act required such a standard only with respect to cars of that type. This would give altogether too narrow a construction to the language employed by Congress, and would lose sight of the spirit and purpose of the legislation. We deem the true intent and meaning to be that the provisions and requirements

respecting train brakes, automatic couplers, grab irons, and the height of draw-bars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. It follows that by the act of 1903 the standard height of draw-bars was made applicable to locomotive engines as well as to freight cars. And so it was held by the Circuit Court of Appeals for the Ninth Circuit in *Chicago &c. Railway Co.* v. *United States*, 196 Fed. Rep. 882, 884.

Judgment affirmed.